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COMMON LAW THEORY

EDITED BY
DOUGLAS E. EDLIN

CAMBRIDGE STUDIES IN
PHILOSOPHY AND LAW

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Common Law Theory

In this book, legal scholars, philosophers, historians, and political scientists from Australia, Canada, New Zealand, the United Kingdom, and the United States analyze the common law through three of its classic themes: rules, reasoning, and constitutionalism. Their essays, specially commissioned for this volume, provide an opportunity for thinkers from different jurisdictions and disciplines to talk to one another and to their wider audience within and beyond the common law world. This book allows scholars and students to consider how these themes and concepts relate to one another. It will initiate and sustain a more inclusive and well-informed theoretical discussion of the common law's method, process, and structure. It will be valuable to lawyers, philosophers, political scientists, and historians interested in constitutional law, comparative law, judicial process, legal theory, law and society, legal history, separation of powers, democratic theory, political philosophy, the courts, and the relationship of the common law tradition to other legal systems of the world.

Douglas E. Edlin is an assistant professor of political science at Dickinson College.

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Introduction

DOUGLAS E. EDLIN

The common law is today as fertile a source for theoretical inquiry as it has ever been. Around the English-speaking world, many scholars of law, philosophy, politics, and history study the theoretical foundations and applications of the common law. Nevertheless, these scholars too infrequently speak directly to one another, across jurisdictional or disciplinary boundaries. In an effort to foster that dialogue, and to frame and contribute to the discussion, this book is organized around certain classic common law concepts or themes: common law rules, common law reasoning, and common law constitutionalism. This thematic structure will help to emphasize the book's contributions to our understanding of the common law and to wider debates about rules, reasoning, and constitutionalism. At the same time, the division of this book into its three constituent parts should be understood as heuristically rather than hermetically motivated. Given the nature of theorizing about the common law, these themes inevitably and fruitfully overlap. Where the common law is concerned, it is difficult to write about rules without also writing about reasoning, and it is difficult to write about constitutionalism without also writing about rules. To theorize meaningfully about the common law, we need to see how these different concepts and domains of thought relate to one another. We need to see the wide-ranging theoretical and practical importance of the common law as a mode of legal thought, a body of legal doctrine, and a structural force in the relationships of governmental actors and institutions at a constitutional level.

Common law judges attempt to do "justice in the individual case"¹ while also understanding and, in some sense, proffering the individualized judgment as a statement of a rule or proposition that can be applied through the doctrine of precedent to a generalized category of similar cases. For the common law, judgments are individual statements of normative evaluation placed within an

¹ See, e.g., *Bell v. Thompson*, 545 U.S. 794, 830 (2005) (Breyer, J., dissenting); *Red Sea Insurance Co. Ltd. v. Bouygues S.A.*, [1995] 1 AC 190, 200 (quoting *Chaplin v. Boys*, [1971] AC 356, 378); *Davis v. Johnson*, [1979] AC 264, 311 (Cumming-Bruce, L.J., dissenting).

existing and evolving system, which are claimed as a contribution to ongoing public debate and to the articulation of public standards of governance. If the common law judgment is accepted as correct, it will be instantiated within the legal system as a general rule properly applicable to a range of similar or analogous circumstances. The common law's preoccupation with reason and judgment stems from its public claim of the intersubjective validity of the applications of reason in judgment, for if a particular judgment is valid for a given instance then it should be valid for all like instances.

I will mention, but not pursue here, the observation that in this respect common law judgments might be understood to track the form of Kantian synthetic *a priori* judgments.² There may be important connections between Kant's work on aesthetic judgment, in particular, and the common law.³ For Kant, though, the cognitive structure and nature of synthetic *a priori* judgments appear to remain substantially constant across different domains of inquiry (aesthetic, moral, scientific) and when directed toward different intellectual ends (beauty, right, truth). The usefulness of this parallel turns, then, on the question of whether the same could be said for common law judgments in the legal domain that are directed toward, perhaps, justice.

The claim of intersubjective validity touches upon the three sections of this book in different ways. Some theorists approach the issue of intersubjective validity by studying the use of precedent in the formulation of legal rules, which are binding (*vel non*) under certain conditions and in accordance with preexisting legal practices and standards. Larry Alexander and Emily Sherwin examine the ways in which prior case decisions function as rules when guiding the decisions of later judges, and John Gardner explores the positive nature of legal norms produced by courts, legislatures, and otherwise within the common law tradition. Other theorists concentrate on the range of instances in which a prior judgment should be deemed to possess precedential force. In other words, these theorists examine the scope of precedent by asking when and why cases are relevantly like prior decisions so that analogical reasoning may be deemed an appropriate method for understanding a later case in light of an earlier

² Cf. Immanuel Kant, *First Introduction to the Critique of Judgment* (Irvington Publishers, 1965), 15 ("[T]he faculty of judgment . . . is not simply a capacity of subsuming the particular under the universal whose concept is given, but also the converse, of finding the universal for the particular"); Ted Cohen and Paul Guyer, eds., *Essays in Kant's Aesthetics* (University of Chicago Press, 1982), 12; Paul Guyer, "Introduction" in Paul Guyer, ed., *The Cambridge Companion to Kant* (Cambridge University Press, 1992), 20–1; Paul Guyer, *Kant and the Claims of Taste* (Harvard University Press, 1979), 1–10, 68–9, 110–16, 133–7, 143–7.

³ See generally Michael Denny, "The Privilege of Ourselves: Hannah Arendt on Judgment" in Melvyn A. Hill, ed., *Hannah Arendt: The Recovery of the Public World* (St. Martin's Press, 1979), 263 ("If Kant had been an Englishman he might have noticed that the same sort of reflective judgment [operative in aesthetics] seems to work in the common-law tradition . . . a sense for justice develops through case precedents much as a taste for beauty develops through the appreciation of exemplary models of artistic excellence").

one. These questions, and others, are addressed in the contributions of Melvin Eisenberg, Gerald Postema, and David Dyzenhaus and Michael Taggart. The final group of scholars, James Stoner, T.R.S. Allan, and Jeffrey Goldsworthy, consider the ways that common law principles and rules structure and limit the government and its citizens in common law nations with varying norms of legislative supremacy and varying forms of fundamental rights.

Whether in the form of precedential rules, legal reasoning, or constitutional principles, the common law's claims of intersubjective validity also help to explain why the essays in this book address issues of justification and authority, in one fashion or another. The common law method requires judges to defend as well as define the normative standards that are formulated and refined in the course of resolving legal disputes. The reasoned judicial opinion is a form of public discourse that articulates – to the litigants whose case is decided, to the individuals who will be bound precedentially by that case in the future, to the range of actors to whom the opinion may be applied analogically, and to the government that may be constitutionally required to respect that opinion – a legal result, a legal rule, and a legal rationale for every decision supported by a justificatory opinion. In terms of legal authority, the justification for a common law norm is as important as the norm itself, because in an important sense the justification of the common law norm *is* the source of its ongoing authority. Common law judges do not just say what the law is, they explain why the law is that way. Those public explanations and justifications demonstrate, or attempt to demonstrate, to the public and to the government the law's claims of legitimacy and authority.

Rules

Beginning with common law rules, Larry Alexander and Emily Sherwin examine the definitive place of precedent in the decision making of common law judges. Their work touches upon the role of precedent in relation to the common law itself and to the normative aspects of rules and rule-oriented decision making. They consider a range of views about the role of precedent in judicial reasoning and argue that common law judges should treat prior judicial decisions as rules that bind their instant decisions just as their instant decisions should be treated as binding rules by future judges. As Alexander and Sherwin see it, if judges always reasoned perfectly, precedent would be binding solely in proportion to its moral correctness. But because judges sometimes make mistakes, precedent minimizes the risk of judicial error while maintaining doctrinal and systemic stability. Moreover, Alexander and Sherwin argue that one commonly accepted rationale for the doctrine of precedent – providing equal treatment for litigants – actually does not hold up in practice, because no two litigants are ever identically situated. The decision whether to follow precedent always, inevitably, turns on a judicial determination of when and whether to

decide that two litigants are, for precedential purposes, similarly situated. That determination cannot accurately be described as the decision to follow or reject precedent.

Alexander and Sherwin argue for a rule model of precedent. The rule model provides judges with a reasonably definite and workable standard from which to begin their reasoning in a later case. Although less ideal than perfectly executed all-things-considered moral reasoning in every case, the advantage of the rule model for human judges is that fewer or less significant mistakes will be made systemically than if every judge attempted to engage in her own independent moral evaluation in every case.

Assuming broad social and political consensus on the need to resolve coordination problems as well as possible, along with disagreement about how best to achieve these resolutions, Alexander and Sherwin focus on the place of the judicial process as an authoritative public forum for concluding interpersonal disputes in a plural society consistent with widely shared societal commitments to fairness and equal treatment. In this context, Alexander and Sherwin believe that judicial decisions should meet requirements of publicity (via published, reasoned opinions), reliance (in binding the litigants to the result and achieving finality for their dispute), and consistency (in guiding future actors by the results achieved in prior cases).

Alexander and Sherwin conclude by reaffirming that precedent rules are rules and they examine some further advantages of and challenges for the rule model of precedent. First, they ask whether the rule model would require that precedents establish rules explicitly and concretely or whether precedent rules could be gleaned implicitly from prior decisions. Implicit precedent rules sacrifice many of the advantages of coordination and legitimate expectation provided by explicit rules, and implicit rules may not force courts to consider the consequences of their decisions as carefully as they would when self-consciously promulgating a rule to govern later decisions. Nevertheless, Alexander and Sherwin argue that there are sufficient limiting forces within common law methodology to permit the formulation of precedent via implicit rules. Most fundamentally, to function as a precedent rule, an implicit rule cannot simply be extracted from a case or cases by later courts reading a rule back into those decisions; the rule must have been intended as a normative statement when it was written. In other words, Alexander and Sherwin argue that the rule/principle distinction obtains when locating precedent statements, and these statements must possess the form and function of rules, not principles.

While later courts cannot simply interpolate precedent rules into decisions that cannot fairly be read to contain them, later courts do serve an important role in determining the contours of a precedent rule and the appropriate occasions for its application. In the absence of any precedent rule, Alexander and Sherwin note the conventional view that judges may employ analogical reasoning to reach an outcome that, even if not governed by a precedent rule, might at least be guided

by and consistent with existing precedent rules. They question whether this view is accurate. If the later outcome is fully consistent with existing precedent, then the outcome was, in fact, an application of that (perhaps implicit) precedent rule. If no precedent rule exists, then the later court may engage in abduction of a principle from the case law, but as an example of precedent formulation this process would suffer from the defects of the model of principles. Alexander and Sherwin believe that a presumption in favor of a precedent rule is the best way to achieve balance between doctrinal stability and substantive development in the common law (a point to which Melvin Eisenberg will return in his chapter).

Like the common law, legal positivism originated in England. Curiously, given their shared birthplace, there is a widely held suspicion that legal positivism cannot fully account for the various ways in which legal rules are formulated within the common law tradition. In particular, the claim is sometimes made that positivism cannot account for common law rules created by customary and judicial processes. This view tends to see the common law as problematic for positivism's commitment to a rule of recognition,⁴ and this view tends to claim that positivism's commitment to a domain of authoritative legal sources restricts and distorts our understanding of judicial decision making.⁵ Some contemporary legal theorists have attempted to rebut, or circumvent, these criticisms of positivism through the development of more sophisticated articulations of the rule of recognition and the sources thesis.⁶

⁴ See, e.g., Richard A. Posner, *The Problematics of Moral and Legal Theory* (Harvard University Press, 1999), 93 ("Hart's book [*The Concept of Law*] does not even contain an index reference to 'common law.' The common law is an embarrassment to his account. . . . The common law cannot be fitted to the idea of a rule of recognition."). The lack of an index reference notwithstanding, Hart apparently believed that his version of positivism could accommodate the common law. See, e.g., H.L.A. Hart, *The Concept of Law* (2nd ed.) (Oxford University Press, 1994), 265 ("[S]ome legal principles, including some basic principles of the Common Law, . . . are identified as law by the 'pedigree' test in that they have been consistently invoked by courts in ranges of different cases as providing reasons for decision. . ."). See also Hart, *The Concept of Law*, 95–7, 116–17, 134–5, 145–6.

⁵ This criticism of positivism is contained in Ronald Dworkin's classic exchange with Hart over the "rule/principle" distinction. See generally Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), 22–31. Although the two points are closely related in certain respects, the rule/principle criticism and the rule-of-recognition criticism are conceptually distinct. See Dworkin, *Taking Rights Seriously*, 71–2.

⁶ See generally Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979), 45–52, 68–9; David Lyons, *Principles, Positivism, and Legal Theory*, 87 *Yale Law Journal* 415, 423–4 (1977); Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 *Michigan Law Review* 473 (1977); Jules Coleman, *Negative and Positive Positivism*, 11 *Journal of Legal Studies* 139 (1982). These efforts by positivists to respond to Dworkin and other critics led to more nuanced distinctions between so-called exclusive and inclusive positivists, which are best left for another time, except to say that Hart himself expressly endorsed inclusive positivism (also known as "soft" positivism or incorporationism) in the Postscript. See Hart, *The Concept of Law*, 250. In fact, Hart's position on this point was fairly clear long before he wrote the Postscript. See, e.g., Hart, *The Concept of Law*, 204 ("In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral

John Gardner approaches these explicit and implicit criticisms of positivism from a different direction. Rather than accept that modifications to the rule of recognition or the sources thesis must be made, Gardner explains that, if we properly understand the three modes by which common law rules are created, we will see that H.L.A. Hart's positivism is quite capable of explaining their creation and recognition as legal sources. Gardner analyzes legislated law, customary law, and case law by considering how each category of law is made. More specifically, Gardner examines the creation of law in each category according to whether it is expressly made, whether it is intentionally made, and whether it is made by one or more agents. This taxonomy allows Gardner to demonstrate that legislated law is made expressly, intentionally, and through the acts of an agent while customary law is not made expressly, intentionally, or through the acts of an agent. Case law occupies a middle ground: It is not expressly made, it may be intentionally made, and it is made through the act of a single (individual or institutional) agent.

Gardner then considers the relationship of the common law (as a type of law) with the Common Law (as a legal tradition). On this analysis, Gardner explains, common law is an amalgam of case law and customary law. Using the doctrine of *stare decisis* as an example, Gardner demonstrates that the common law consists of case law together with judicial customary law. In Common Law systems, Gardner suggests, case law exists as an autonomous source of law, which need not be (and is not) devoted solely to statutory interpretation; case law in Common Law jurisdictions often importantly involves the development and interpretation of prior case law. Case law can usefully be related to customary and statutory law, as Gardner does, but Gardner also points out that in Common Law systems case law also exists as a categorically distinct source of law.

Gardner concludes by explaining that all three categories of law – legislated, customary, and decisional – are forms of positive law. The fact that customary and case law are not legislated sometimes leads people to conclude, mistakenly, that they are not positive or posited law. The error here, as Gardner points out, is that customary and case law are still made by someone, even though they are not always made expressly or intentionally. Indeed, as Gardner emphasizes, all law is and must be positive law. Throughout his analysis, Gardner applies the work of positivists such as Bentham, Austin, and Hart. In doing so, Gardner exposes the errors of certain theorists (some of whom are positivists) who assume that all law must be understood on the model of legislation. He likewise

values..."); H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983), 361 ("[A] constitution could include in its restrictions on the legislative power even of its supreme legislature not only conformity with due process but a completely general provision that its legal power should lapse if its enactments ever conflicted with principles of morality and justice") (first published in 1965).

offers a response to those who have asserted that positivism cannot reconcile the common law with a rule of recognition that delineates a domain of authoritative legal sources.

Reasoning

Like the formulation, interpretation, and application of its rules, another of the central and abiding aspects of the common law that has always commanded the attention of its scholars is its mode of reasoning. The uses of precedent and analogy, as well as the common law judicial obligation to provide reasoned decisions for legal rulings, are vital to the workings of the common law system and to the methods and results of practical reasoning more generally. These issues arise in the context of several related sets of debates: whether precedent is truly a legal standard or a social practice, the normative justifications for precedential constraints, whether legal reasoning by analogy actually exists, whether analogical reasoning differs from deductive reasoning, the role of analogical reasoning in justifying judicial determinations, the relationship between analogical and precedential reasoning, and the relationship between analogical reasoning and the creation or presupposition of rules. Moreover, some writers contest the claim that there is anything especially unique or valuable about legal or judicial reasoning.

Melvin Eisenberg addresses several of these issues in his chapter. Eisenberg arranges his study of the principles that can and should inform common law legal reasoning around four claims. The first is that courts should make law in the absence of legislated rules. Institutionally, the common law judiciary resolves private disputes and, in doing so, formulates and refines the legal principles that regulate private acts. Given the legislature's preoccupation with public law matters as well as the functional differences between codification and adjudication, Eisenberg argues that courts fulfill an important social role by generating binding legal norms as a by-product of resolving legal disagreements among citizens. A crucial link between rule making and reasoning according to Eisenberg is that, when generating legal norms, courts must engage in a form of legal reasoning that is familiar to and may be reproduced by the legal profession. This allows lawyers to advise clients with some confidence and success about the state of the law and the legality of clients' actions.

Eisenberg's second claim balances the formulation of legal doctrine against the principles of political morality upon which social norms have developed. Legal sources recognized as authoritative, which Eisenberg calls doctrinal propositions, must be considered in relation to the moral, political, and empirical commitments and understandings of the society in which the law operates, which Eisenberg calls social propositions. In other words, we cannot fully apprehend the meaning of a legal rule without also contemplating the reasons for that legal rule.

This point relates directly to the third prong of Eisenberg's argument. Eisenberg emphasizes the distinction between the existence of a legal rule and the justification for that legal rule. The recognition that a particular rule is identified as a legal rule through some authoritative source does not justify ongoing deference to that legal rule. Only social propositions, according to Eisenberg, can justify doctrinal propositions.

Finally, Eisenberg argues that consistency in the application of legal rules depends upon the consistent recognition and realization of the underlying social propositions that animate their attendant doctrinal propositions. In Holmesian fashion, Eisenberg notes that the determination of when two cases are sufficiently alike such that they should be treated alike does not depend upon syllogistic reasoning. Instead, this determination depends upon a sensitive appreciation of the social propositions that inform evaluations of salient likeness or difference in comparing the two cases.

Eisenberg develops these four foundational concepts in an effort to address a recurring common law dilemma: How can the law remain stable and yet not stand still?⁷ For Eisenberg, this dilemma is phrased as a tension between the ideal of doctrinal stability and the ideal of social congruence. This tension is cast on a spectrum from rules that comport perfectly with social propositions on one side through imperfect correlations in the middle and over to rules that completely disconnect from social propositions on the other side. Eisenberg attempts to resolve this tension by formulating his basic principle of legal reasoning: Doctrinal rules should be applied and extended where they are substantially consistent with social propositions, but doctrinal rules should not be applied and extended if they are not substantially congruent with social propositions.

Eisenberg then evaluates different modes of legal reasoning – use of precedent, distinguishing, and analogy – to analyze the invocation and evaluation of these concepts and principles in reported case decisions from various jurisdictions. In the end, Eisenberg finds that social propositions are always operative in common law legal reasoning, implicitly where doctrinal rules are congruent with underlying social propositions and explicitly where judges determine that a doctrinal rule must be modified because it deviates significantly from underlying social propositions.

Gerald Postema begins his examination of analogical reasoning by grounding historically what he calls the classical common law conception of this mode of legal thought. As Postema explains, three elements characterize the classical conception of analogical reasoning at common law: (1) this process has a *prima facie* claim to legitimacy in practical reasoning, (2) the method involves drawing inferences from decided cases (or source analogues) to a novel case (or target

⁷ I am, of course, paraphrasing Roscoe Pound here.

analogue) to determine the basis for deciding the novel case in the same way as the decided cases, (3) the determination that a sufficient resemblance exists between the novel case and the decided cases, which would justify deciding the latter case in conformity with the precedent cases. In other words, if a rule can be divined by locating the rationale that unifies the resolution of the novel case and the precedent cases, that rule is extrapolated from the cases rather than applied to them.

Postema then responds to claims that analogical thinking (and legal reasoning more generally) is neither autonomous nor distinctive. In defending the viability of classical common law reasoning by analogy, Postema distinguishes two types of argument that the critics of analogical reasoning mistakenly attribute to the proponents of the classical conception of analogical reasoning (or that proponents sometimes mistakenly advance in an effort to defend analogical reasoning).

The first type of argument skeptics sometimes impute to the advocates of analogical reasoning is particularism. Particularists are thought to argue that practical reasoning requires the identification of shared particular qualities between two cases. On this account, analogical reasoning involves a relationship between shared characteristics of different cases (the substantive thesis) and our recognition or apprehension of this relationship (the epistemological thesis). We may apprehend the relationship between shared particulars through intuition or disposition or in some other way. However this relationship is ascertained, skeptics of analogical reasoning respond to the particularist defense in the same fundamental manner. The substantive thesis cannot sustain analogical reasoning as a viable method of practical reason, because shared particular characteristics can never serve as a basis for judgment or action without some more general principle or rule to guide the determination that these are the characteristics that matter for purposes of rendering judgment or determining appropriate action. In other words, particularism fails as a defense of analogical reasoning precisely because the particulars themselves cannot aid practical reasoning without some prior standard for determining which particulars are dispositive.

What distinguishes particularism from the classical conception of analogical reasoning, properly understood, is the failure of particularism's epistemological thesis. The method of determining germane similarities between cases is neither intuitive nor dispositional; it is, in Postema's terms, discursive. Determining relevant similarities between cases depends, in the classical common law conception, upon reasoned argument rather than on a feeling or a perception. Postema helps us see that particularism is not part of the genuine theoretical framework of analogical reasoning.

Next Postema turns to the other theoretical argument often offered (or assumed) as undergirding analogical reasoning. He calls this rule-rationalism. Rule-rationalism avoids the problems of particularism by noting from the

beginning that analogical reasoning is not merely about detecting similarities between cases; it is about detecting relevant similarities between cases. And the determination that similarities are relevant can be reached only through a preexisting norm that classifies certain qualities as significant. But ultimately rule-rationalism presents a problem of infinite regress for analogical reasoning. If the judgment that two cases are relevantly similar necessitates a preexisting rule to guide that judgment, then there must also be another rule that tells us which rule to apply when determining the relevant similarity between cases. And this goes on forever.

Postema counters the rule-rationalist account of analogical reasoning by noting that the rationalist account is committed to a deductive, top-down conception of reasoning. But as Postema explains, common law analogical reasoning is not committed to this account of reasoning. Overemphasis on deduction often leads people to confuse logical reasoning with correct reasoning. The fact that a conclusion follows from premises does not necessarily mean that the conclusion is correct. Through analogical reasoning, the common law has always, at least implicitly, understood this. As a result, common law analogical reasoning demands constant evaluation of an argument's premises and conclusions. Considered judgment in the common law tradition is reflective and reflexive. For this reason, the rule-rationalist account of analogical reasoning is inapposite.

Having distinguished particularism and rule-rationalism from the classical conception of analogical reasoning, Postema then defends the authentic mode of analogical reasoning in the common law tradition. In doing so, Postema separates analogical reasoning into two interrelated levels that he calls analogical reasoning and analogy assessment. Analogical reasoning is the level at which potential analogues are identified, and analogy assessment is the level at which these analogues are evaluated. These stages of reasoning may occur sequentially or they may occur simultaneously, in a sort of *gestalt* shifting between identification and evaluation of potential analogues.

Analogical reasoning is not unique to law. Indeed, as Postema emphasizes, analogical reasoning is fundamental to myriad areas of human cognition. For Postema, though, this is the point. A core feature of analogical reasoning is the formation of judgments through a discursive process in which judgments are defended as a result of the articulate or implicit claim by the judges (or judges) that their judgments are correct. Postema highlights the Kantian notion that judges are responsible for their judgments and that errors of judgment (as conclusions reached or reasons given) are considered to be mistakes that may be criticized, rather than mere aberrations that should be disregarded (a notion that Hart expressed in a related context as the "internal aspect of rules seen from their internal point of view"⁸). These general features of analogical

⁸ Hart, *The Concept of Law*, 90. See also *id.* at 55–7, 137–8.

reasoning, while not unique to law, are uniquely important to the common law tradition. The stages of analogy identification, evaluation, reaching judgments, and supporting those judgments with articulated reasons are defining features of the common law method of analogical reasoning. Treating like cases alike requires determining the existing category of like cases, the relevant criteria of likeness in a given case, and the proper method of articulating the likenesses when rendering a judgment about why a case is or is not sufficiently like another so as to be treated in the same manner. As Postema demonstrates, this cognitive process is best understood not as a form of argument but rather as a mode of argumentation. Analogical reasoning in law is always, even (or especially) at the reflective level of analogy assessment, a form of practical reasoning. Analogical reasoning is used by judges who must attempt to decide real cases with concrete consequences for actual people. The legitimacy of the process is ultimately determined by the results reached through the process rather than by a theoretical defense of the process. This is not to say, however, that the process cannot or should not be theoretically defended. In fact, this is precisely what Postema does.

David Dyzenhaus and Michael Taggart analyze a bedrock assumption of common law reasoning: that judges must give reasons for their decisions. As they point out, the assumption is that common law judges are under an institutional obligation to provide the reasons for their decisions in some readily available form. As Dyzenhaus and Taggart explain, however, the historical reality is more complicated. Although there has long been a judicial convention in common law systems to provide reasons for decisions, there has not been a legal obligation on the part of judges to do so. Although published law reports began in the sixteenth century and a doctrine of precedent evolved thereafter, Dyzenhaus and Taggart observe that the reasoned first-instance judgment began with the shift from civil juries to bench trials in the mid-nineteenth century and solidified with the central appeal procedure, which encouraged trial judges, who were eager not to have their judgments overturned by appellate courts, to record their reasoning carefully in written opinions.

Dyzenhaus and Taggart also highlight four aspects of the development of reason-giving by courts that sometimes contrast with modern practice in common law jurisdictions. First, a judge's ruling was understood to be separate from its supportive reasoning. Judges had to decide cases, but they did not have to explain their decisions. Second, even when a lower court judge provided the reasons that (he believed) supported his decision, these reasons were not necessarily part of the record on appeal. The reasons for a decision had to be made part of the record below if an appellate court were to have the opportunity to review them. The absence of any enforceable legal obligation to provide reasons meant that lower court judges frequently did not include their reasoning in the judgment on appeal. Third, publication of case reports was not always a prerequisite to citation. Citation by a barrister was considered sufficient proof

of authenticity and authoritativeness. Fourth, unlike other legal sources, the authority of the common law came from its acceptance and use by lawyers and judges, rather than from a formalized statement issued by a governmental entity.

Dyzenhaus and Taggart then explain how this historical development of common law reason-giving informs contemporary practice. They point out that the dual judicial functions of dispute resolution and norm articulation bear different weights at different levels of the judicial hierarchy. The dispute resolution function is most important at the trial court level, and the norm articulation function takes precedence at the appellate level. Correspondingly, the fact finding on which dispute resolution so often turns is the function of trial courts, whereas the most detailed reason-giving occurs at the appellate level. They also note that Australia has, for about a century, imposed a legal obligation on judges to give reasons for decisions. This trend has been followed (albeit haltingly) in the United Kingdom, Canada, and New Zealand. In addition, various statutory, common law, and supranational means have conspired to create a fairly general requirement in common law nations for administrative decision makers to give reasons for their decisions.

The contemporary practice of reason-giving is informed, as Dyzenhaus and Taggart explain, by the recognition that modern common law doctrines derive much of their authority from the persuasiveness of the reasons offered by judges in their opinions. And coupled with the increased importance of reasoning to authoritativeness are technological advancements that encourage greater length of opinions and frequency of citations. The irony here is that the availability of these online resources has also led, in some jurisdictions, to a bifurcation of judicial opinions into those with precedential authority (which can be freely cited in court) and those without this authority (which often cannot be cited as precedent by attorneys).⁹

Dyzenhaus and Taggart then argue that the commitment to reason-giving as justification for the exercise of public power indicates that the command conception of authority is importantly inconsistent with the theoretical and historical conception of legal authority in the common law tradition. This point is echoed and developed in T.R.S. Allan's discussion of common law constitutionalism. Under the command conception of authority, the commander need not (and perhaps should not) offer reasons for decisions, and the meaning of the commander's commands must be ascertainable apart from any reference to the commander's underlying reasons for giving the command. Being able to determine the content of the commands without reference to underlying reasons does not mean, however, that this content can always be perfectly or mechanically determined. According to Dyzenhaus and Taggart, theorists have understood

⁹ See, e.g., Richard A. Posner, *The Federal Courts: Challenge and Reform* (2nd ed.) (Harvard University Press, 1996), 162–75.

for some time that interpretation will inevitably be necessary, and so Hobbes, for example, appreciated the necessity of judges. And the authority of judicial decisions at common law rests ultimately on the reasoned justifications offered by judges for their rulings, not on the mere existence of the rulings themselves. Reason-giving attempts to justify the exercise of power to those subject to that power. In terms of principle, this demonstrates the relationship of the common law method to rule of law values. In terms of pragmatics, this demonstrates the relationship of the subject (as a rational actor who understands the reasons for remaining a subject) to the sovereign.

Dyzenhaus and Taggart then relate their discussion of reason-giving to the broader frameworks of legal theory within which the common law has been (or, more frequently according to them, has not been) evaluated. Dyzenhaus and Taggart divide the legal philosophers who theorize about the common law into three categories: (1) common law romantics, such as Ronald Dworkin, who relate the understanding of the common law and the understanding of the relationship between law and morality to the study of judicial interpretation of law, (2) political legal positivists, such as Jeremy Bentham, who argue against the common law system and in favor of a particular conception of law as part of a broader attempt to unify the legal and political order, and (3) conceptual legal positivists, such as H.L.A. Hart, who argue for a conception of law in which judicial decisions in hard cases are exercises of strong discretion unconstrained (in large part) by existing legal norms. The position of conceptual positivists is, on Dyzenhaus and Taggart's account, contradistinguished from that of the common law romantics, who argue that, even in hard cases, the right answer in a legal dispute can be determined from preexisting legal principles, provided that judges reason correctly.

According to Dyzenhaus and Taggart, conceptual positivists have been conspicuously reticent about discussing common law adjudication because, if they tried to do so, they would be forced to choose between jettisoning the common law along with Bentham and political positivism or psychologizing the common lawyer (from the internal point of view) along with Dworkin and the common law romantics. Dyzenhaus and Taggart conclude that this leaves conceptual positivism with an inadequate explanation of the common law as it exists in practice. By focusing on the nature of law as public rules rather than on the nature of common law as the justificatory exercise of public authority, conceptual positivists are restricted to a notion of judges as quasi-legislators in hard cases. At least this leaves positivists unconcerned about the notable inattention for much of common law history to any legal requirement that judges give reasons for their decisions. After all, Dyzenhaus and Taggart argue, for conceptual positivists it is the ruling, not the reasoning, that matters most. Although he approaches the issues from a different perspective and uses different terminology, John Gardner's contribution to this volume can be read as engaging, on behalf of conceptual positivism, with some of Dyzenhaus and Taggart's arguments.

On the other hand, the common law romantics have a different problem where reason-giving is concerned. By assuming the obligation upon common law judges to explain their judgments with reasons, common law romantics fail to notice that their account of common law adjudication runs counter to centuries of common law history. This is why the historical analysis offered by Dyzenhaus and Taggart is so important to the larger theoretical debate. The theoretical account of conceptual positivism ignores, Dyzenhaus and Taggart say, the practice of reason-giving in an effort to conceptualize law as rules, thereby failing to describe the existing practice accurately. Conversely, the theoretical account of common law romanticism idealizes the practice of reason-giving and fails to explain the historical reality that common law judges are not, in fact, required to give reasons for their decisions. In the end, Dyzenhaus and Taggart argue that, so long as the common law tradition fails to incorporate a unified obligation of reason-giving for legal officials, it will inexorably be committed, at least in part, to the positivists' command conception of legal authority. At the same time, however, a pervasive obligation of reason-giving for all legal norms would probably not serve best in areas of law arguably better suited to a more rule-oriented command conception (such as many areas of statutory law). Even here, though, the reason-based justificatory nature of common law decision making means that statutes, which may derive their initial authority from a command conception, must still satisfy a reason-based account of their ongoing authority when challenged in court as, for example, violative of constitutional principles intrinsic to a given regime. Dyzenhaus and Taggart conclude, therefore, that the common law has managed to achieve a systemic balance between the legal authority of reasons and commands, and a proper understanding of this balance necessitates more precise attention to legal theory and legal history.

Constitutionalism

The final area of scholarly interest in the common law addressed in this volume involves its intrinsic nature as an evolving but enduring articulation of rule-of-law values. Questions that arise in this area explore the meaning of constitutional democracy in common law nations. Does the inherent jurisdiction of common law courts threaten the position of legislative assemblies in republican governments? Does (or can) the common law express fundamental principles that constrain representative branches of government? Does the common law possess an inherent constitutional dimension? Attempts to answer these questions necessitate consideration of the institutional aptitudes of and relationships between the judiciary and the legislature, the relationship of common law to statutory and public law, and the treatment of "fundamental law" in common law legal systems.

James Stoner begins this discussion by considering the relationships among common law, natural law, and the U.S. Constitution. Stoner traces the connections between law and reason in the writings of Aquinas, Aristotle, Cicero, Coke, Grotius, Hobbes, and Locke. In this way, Stoner connects the discussion of constitutionalism to the previous discussions of reasoning and reason-giving. Both as a form of public reason and as a mode of constitutional constraint, the common law provides a means of justifying the exercise of legal sanction and governmental power to those subject to that sanction and power. In other words, the historical relation of reason to law in the common law tradition, in the form of judicial reason-giving and in the form of constitutional texts, is a method of public justification of the substantive constraints law imposes on the people and their institutions of government.

Stoner begins his more detailed analysis with the common law. As he explains, the traditional common law focus was on ancient customs recognized by courts rather than on the principles and norms generated by courts. The development of a doctrine of precedent was, in itself, evidence of the common law's historical commitment to the force and place of reason, because precedents determined to contradict reason would be overturned or disregarded. Stoner then mentions the importance of the jury to the common law tradition. The jury, too, reflects the commitment to custom and reason in the application of legal standards to factual disputes. Ordinary community members would be familiar with local customs and could exercise their own reason in determining the meaning of certain events and in rendering a verdict about legal responsibility and culpability. And, of course, this was also a method of engaging the community directly in the application of public standards to individual cases.

Stoner then turns to the writing of the Constitution (or, more precisely, constitutions) in the United States. The unwritten English Constitution was thought by the American founders to leave the central government with too much power in too undefined and undiluted a form. But the U.S. Declaration of Independence from Britain itself makes reference to principles of constitutionalism and to a constitution, and Stoner explains that this reference, at that time, could be a reference only to unwritten principles of an Anglo-American constitution (or constitutional tradition). Moreover, the Constitution that was later written protected against all of the abuses mentioned in the Declaration and provides evidence that the framers viewed themselves as developing an inherited tradition, rather than creating an entirely new one. The Constitution's language, judicial institution, and fundamental rights all refer, in one form or another, to the existing common law tradition with which the framers were, after all, most familiar. Stoner's point here is not to deny the genuine structural and institutional innovations of the U.S. Constitution. On the contrary, Stoner argues that these innovations – separation of powers, federalism, republicanism – are best understood, and were understood, not as a replacement of the traditional system

of government but rather as a reasoned reform of it. Stoner emphasizes here that constitutional interpretation of all kinds and from all ideological perspectives must account for the fact that the Constitution's incorporation of common law institutions, values, and principles was intended as realizing within a system of government the best protection of individual liberty.

This takes Stoner to his discussion of natural law. Stoner points out the conceptual relationship between the work of John Finnis and that of John Rawls and Ronald Dworkin. Finnis and Rawls both develop theories of justice; Finnis and Dworkin both write in response to H.L.A. Hart. But while Rawls and Dworkin base their work on the Kantian philosophical tradition, Finnis builds his upon the Thomistic tradition. Here, again, Stoner highlights the themes of reason, reason-giving, and public justification for legal rulings. Common law constitutionalism and common law reasoning are related in the public requirement (or expectation) of judicial reason-giving. Stoner argues that Finnis's natural law theory can serve as a theoretical foundation for common law rules and institutions just as well as the liberal theories of Rawls and Dworkin can. Indeed, Stoner says, Finnis may do a better job in this regard, because his work is more closely related to traditional common law reasoning. In its engagement with and reliance upon the reason of every individual, rather than only the reason of judges and other officials, Stoner suggests that Finnis's natural law theory actually provides a framework more consistent with popular constitutionalism within the common law tradition. Natural law and liberalism are, according to Stoner, actually closely related in their focus on autonomous choice, individual rights, and the social experience of modern citizens in the polity. In addition, the natural law theory Finnis articulated offers common law constitutionalism a theoretical framework and vocabulary to those who seek an alternative to Rawlsian liberalism.

Stoner concludes his chapter with an application of this natural law framework to the debate about same-sex marriage in the United States. More than many alternatives, Stoner argues that natural law theory – at least as Finnis developed it – affords a means of engaging in meaningful public debate about the policy outcomes and constitutional implications that surround the issue without preconceptions or polemics. Like the common law, the public debate envisioned by Finnis's natural law theory depends ultimately upon the reasons given to justify a result (whether by judges or others). Tradition alone is not enough. In the end, reliance on precedent is reliance on reason, and as Stoner mentions with the quotation that begins his chapter, nothing that is against reason is lawful. The debate about same-sex marriage is, or should be, a debate about what is reasonable and what is constitutional. Viewed from the perspective of natural law theory, common law constitutionalism is a matter of seeing that, in an important sense, those amount to the same question.

Trevor Allan begins his discussion of common law constitutionalism by noting the relationship between common law principles and social mores. Allan

then notes the relationship between evolving legal principles and aspirational (and actual) constitutional values in common law systems. These social mores and values inform the evolution of common law norms and reflect the common law's commitment to public justification of these norms as reflective of that society's moral (and constitutional) commitments. The former point connects Allan's essay, in part, to Eisenberg's discussion of the justification of legal rules by reference to social propositions. The latter point reflects the connection between Allan's analysis of constitutionalism and Dyzenhaus and Taggart's discussion of reason-giving, together with Postema's treatment of deliberative common law reasoning as necessarily involving public discourse about claims of justice informed by historical and practical considerations. As Allan goes on to explain, the common law tradition of reasoned public justification is itself reflective of a commitment to constitutional government, irrespective of whether that constitution is written or unwritten.

Allan studies common law constitutionalism through a sustained analysis of statute law and case law. He notes that, like judicial decisions, legislation derives its authority not solely from its institutional source but also (and more importantly) from its substantive coherence with shared social and constitutional principles. The meaning of law, all law, is ultimately derived from and informed by its reflection and articulation of public morality as expressed through a form of public discourse. Like Alexander and Sherwin, Allan emphasizes the importance of rules for common law adjudication and the relationship of these rules to shared societal values. The dichotomy often perceived (or assumed) between legislation and judicial decision obscures the convergence of these two bodies of law: In practice, the necessity of judicial interpretation means that statutory rules will not operate in a formalistic manner, and the doctrine of precedent introduces some salutary stability in the evolution of common law rules. Representative government and democratic legitimacy usually demand that judges enforce the plain terms of statutory enactments. At the same time, however, Allan argues that this point can also be overemphasized. Statutory enactments are themselves always to be understood and interpreted in light of foundational common law principles, and these principles must sometimes be invoked by courts to ensure that legislation comports with fundamental constitutional requirements. Just as precedent informs judicial reasoning and decision making in novel cases, legislative intention and purpose guide later judicial determinations of the statute's scope. Allan's point here is that analogical reasoning applies to common law adjudication involving statutes as well as precedents. In considering the relationship between statutory interpretation and common law adjudication, Allan notes that content and context cannot be entirely disaggregated. Interpretation requires context, and context is constructed by the interpreter. This does not mean that statutory purpose and language are wholly (or even largely) indeterminate. But this does mean that the relevant context will always include explicit or implicit reference to common law principles that

aid in and may constrain available interpretations of otherwise clear statutory language.

Next Allan considers the correlation between authority and reason in the common law. In the common law tradition, legislation is most accurately treated not as a command but as an expression of collective reason at a particular point in time. Similarly, precedent (particularly when construed as a line of cases) is also often viewed as the expression of collective reason over a period of time. Statute law and case law are, then, best understood within the common law tradition as distinct but concordant institutional expressions of legal doctrine within a unified constitutional order.¹⁰ On this account, legal authority does not exist, even conceptually, apart from reason; legal authority must always be expressed (or at least be capable of expression) in light of some reasoned justification. Therefore, Allan argues, if we imagine a piece of legislation entirely contrary to democratic principles of government and to common law principles of justice – that is to say, utterly unreasonable legislation – then that legislation would not be amenable to judicial interpretation or enforcement.

This might seem to conflict with notions of legislative supremacy (in those common law systems where that doctrine obtains), but Allan disagrees. Even where parliamentary sovereignty is understood to be a basic feature of the constitutional architecture, that sovereignty must be exercised in a manner consistent with fundamental rights. Constitutional limitations on legislative authority exist, whether written or unwritten, in every common law system, because common law constitutionalism demands reasoned justification for all acts of public power. In Britain, as Dicey explained with his third definition of the rule of law,¹¹ this means that constitutional principles are necessarily defined by the decisions of courts (and sometimes these decisions will involve limiting the reach of legislative enactments). Moreover, these rule-of-law principles that create constitutional limitations upon government action “are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts.”¹² In other words, as Allan goes on to say, the process of statutory interpretation by courts reinforces the coordination and confluence of institutional authority in common law systems. Democracy and rights coexist, despite occasional tensions between majority and minority interests, because the substance of those rights and the content of statutory law must be integrated in the process of judicial reasoning and decision making. Through the articulation of public reasons for judicial decisions, the courts engage with the people and the

¹⁰ See *R. v. Secretary of State for the Home Department, ex parte Pierson*, [1998] AC 539, 589 (“ultimately, common law and statute law coalesce in one legal system”). See also Louis L. Jaffe, *English and American Judges as Lawmakers* (Oxford University Press, 1969), 20.

¹¹ See A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed.) (Liberty Fund, 1982), 115.

¹² Dicey, *Introduction to the Study of the Law of the Constitution*, 121.

government in discourse about the meaning of their constitution, their shared values, and their political and social environment.

Allan concludes his analysis by examining the role of precedent and tradition in the ongoing expression of public values through judicial reasoning in decided cases. As Allan emphasizes, the institutional, constitutional, and political responsibility for this expression is shared by the courts and the legislature. Courts do not just serve the sociopolitical function of resolving, as a legal matter, contentious moral issues in the face of ongoing public disagreement. Allan believes we must also see that judicial theorizing, perhaps most especially in hard cases, is also a form of political theorizing. Individual litigants are necessary participants in the common law judicial process just as much as those individuals are necessary participants in the democratic political process. Moreover, the products of both institutional processes – case law and statute law – gain their public legitimacy and authority, in part, precisely because of that participation. The results of both processes must likewise be justified, in accordance with each institution's respective structure, limits, and functions, through a form of public discourse and accountability (e.g., judicial opinions and political elections). This means that, for Allan, the common law exists as a form of public reason because judicial reasons and results are derived from the arguments of litigants in court and explain legal outcomes and legal doctrines to litigants and to the public. The characteristic methods of common law reasoning (e.g., precedent and analogy) ensure that current doctrine will always bear some stable and meaningful connection to the past; and common law constitutionalism ensures that legal doctrine will always bear a meaningful connection to (sometimes evolving) public values and constitutional principles.

In the final chapter, Jeffrey Goldsworthy offers a response to Allan. Like Allan, Goldsworthy considers the relationship between statute law and common law specifically and in terms of its broader meaning for issues of parliamentary sovereignty, judicial authority, and common law constitutionalism. Their exchange in this volume continues their ongoing debate in earlier published work¹³ and contributes to the wider debate among British (and other) constitutional theorists about the *ultra vires* doctrine and the bases of judicial review.¹⁴ The more traditional *vires*-based view is that English courts derive their authority to review legislative action from the implicit (or explicit) intentions of Parliament. Given parliamentary sovereignty, a legislative delegation

¹³ See, e.g., Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999), 239–40, 247–65, 270–2, 278–9; T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001), 205–7, 216–25, 231–2, 262–6.

¹⁴ See generally Christopher Forsyth, ed., *Judicial Review and the Constitution* (Hart Publishing, 2000) (anthologizing articles by leading proponents of *vires*-based and common law theories of judicial review).

of authority to an administrative agency necessarily carries with it the tacit presumption that the agency may exercise its authority only as circumscribed by the statutory directive. Whenever an agency exceeds its legislative limitations – and thereby acts *ultra vires* – Parliament intends for the judiciary to recognize the legislative constraints and restrict the agency's actions. Theorists who attempt to harmonize judicial review with parliamentary sovereignty defend this notion of the *ultra vires* doctrine as maintaining a meaningful sphere of judicial review that does not offend the orthodoxy of Parliament's theoretically unbounded legal authority.¹⁵ Other theorists, such as Allan, argue that the common law underpins the unwritten British constitution. These theorists argue that the authentic foundations of judicial review are to be found in common law principles, which predate and are more fundamental to British constitutional law and theory than parliamentary sovereignty.

Goldsworthy argues that the common law theory of judicial review distorts the relationship between statute law and case law. The problem concerns a link between constitutional theory and legal theory. According to Goldsworthy, positivism views the common law as legal rules that can be made and unmade by judges, while Dworkinian theory views common law as legal norms constructed by judges through an interpretive process that presents the law in its best possible moral light (given certain constitutional, institutional, historical, social, and political constraints). Either way, judges occupy an institutional space above, rather than below, the legislature. As a result, the common law becomes coextensive with the constitution. Some theorists welcome this as ensuring that all legal systems in the common law world remain committed to principles of constitutionalism that have, historically and theoretically, restrained government power by the rule of law. Other theorists argue that the common law theory of judicial review threatens the core doctrine of the British constitution, and by extension the constitutions of other Commonwealth nations, while claiming to recover it. And as Goldsworthy explains, the common law theory is gaining judicial acceptance in England, Australia, and Canada.

Goldsworthy challenges the theory of the common law constitution historically and philosophically. Historically, Goldsworthy argues that the common law did not, and does not, establish the legal framework of English government. Goldsworthy considers three questions: (1) what is the nature of the common law? (2) what is the scope of the common law? and (3) who has ultimate authority to expound the common law? Using these questions as a thematic framework, Goldsworthy examines common law history from the medieval period forward. He argues that there has never been one settled answer to any of these questions and that the prevailing opinion about aspects of these questions has varied over time. Even the most fundamental and generally established ideas – for

¹⁵ See Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, 2001), 106–13.

example, that the unwritten English constitution consists of common law principles – may carry different connotations during different historical periods. For example, today this idea may mean that the common law constitution encompasses fundamental rights and principles articulated and enforced by common law courts that restrain the government and the people. Centuries ago, however, the idea of a common law constitution might have referred instead to customary law articulated and enforced by Parliament (during the time when Parliament was also considered a court).

Goldsworthy observes that, during the medieval and early modern periods, political theorists and lawyers did not seem to believe that common law served a constitutional function in the recognition or regulation of governmental powers. Whether this function considered in relation to royal title and prerogatives, monarchic succession, or parliamentary authority, English lawyers and theorists have always disagreed about the source of these governmental powers. Some English theorists and lawyers found this source in the common law, but others looked elsewhere. Moreover, Goldsworthy argues, reliance on customary law (as a part of the common law) or reference to famous maxims about the king's being under the law, does not establish the preeminence of common law at a constitutional level, either. These references may well have been undifferentiated claims about the authority of natural or divine law. James Stoner's chapter examines the relationship between common law and natural law in the early United States, and Goldsworthy focuses his attention on England, because constitutional development in both systems, while surely related in illuminating ways, may also be materially distinct when evaluated in historical context. Of course, this too is a point of contention between Goldsworthy and Allan. Allan and Goldsworthy seem to disagree about the magnitude of shared constitutional structures and principles among common law nations.

This leads to Goldsworthy's philosophical analysis. Goldsworthy notes that conceptual arguments between those who accept and those who resist claims of common law constitutionalism amount to arguments about classification of fundamental constitutional principles as statute law or common law norms. By classifying constitutional principles, including the doctrine of parliamentary sovereignty, as common law norms, common law constitutionalists are able to conclude that these principles ultimately depend upon the courts for their articulation and interpretation. Goldsworthy explains, however, that we must evaluate these claims in light of four competing conceptions of the common law: (1) the positivist conception of common law as judge-made rules, (2) the conception of common law as the professional customs and practices of the legal profession, (3) Dworkin's conception of common law as judicially constructed legal principles derived from the best interpretation of existing materials and political morality, and (4) the conception of common law as the received customs or conventions of the community (or of a community of officials within a system).

To determine whether constitutional norms derive from common law principles, Goldsworthy says that two questions must be asked: (1) which available conception of the common law is most plausible and (2) whether constitutional norms fit the chosen conception. Goldsworthy concentrates on the second question. While it is true that parliamentary sovereignty cannot be established statutorily (because Parliament cannot confer its constitutional authority upon itself), Goldsworthy argues that the same holds true for the courts (the judiciary cannot confer constitutional authority upon itself through judicial decisions). Some institutional authority must trace its legal source to something other than statute law or case law. This means, according to Goldsworthy, that common law constitutionalists must follow either the third or the fourth conception of the common law (because the first conception leads to the conceptual problem described previously and the second conception cannot be supported as a matter of historical fact). As a result, Goldsworthy says, many contemporary common law constitutionalists, such as Allan, adhere to the Dworkinian conception of the common law. The value of Dworkin's theoretical work for common law constitutionalism is that it provides a reasonably accurate picture of the way in which many judges believe they fulfill their institutional function when deciding difficult cases. This is also the problem with Dworkin's account, however, where common law constitutionalism is concerned. Goldsworthy believes that Dworkin's conception of the common law cannot account for the actual views of many English judges toward parliamentary sovereignty. Until common law constitutionalists can demonstrate that Dworkin's conception of the common law can be fitted to judicial understandings of parliamentary sovereignty, which Goldsworthy argues they cannot now do, Dworkin's conception cannot help common law constitutionalists establish that parliamentary sovereignty traces its own origins to a common law foundation.

Similarly, Goldsworthy argues that the conception of common law as the shared conventions of a community or its officials will not work, either. Unless other officials accept that the judiciary possesses the unique authority to construct and interpret constitutional doctrines such as parliamentary sovereignty, the judiciary cannot simply claim this authority for itself. So long as parliamentarians and *ultra vires* theorists deny this judicial authority, conventions and official practices cannot establish claims about judicial authority and the common law nature of the unwritten constitution. Goldsworthy does not deny that parliamentary sovereignty depends in part for its authority as a constitutional rule upon the recognition of judges. And conversely, Goldsworthy says, the courts depend for their constitutional authority upon the recognition of Parliament and other institutional actors. It is, Goldsworthy warns, politically and constitutionally dangerous for judges (or theorists) to attempt to alter fundamental doctrines of the unwritten constitution unilaterally. Judges are acknowledged by other officials to possess the authority to alter the traditional areas of the common law (property, tort, contract, etc.); but Goldsworthy contends that it

is misleading to cast fundamental constitutional norms as “common law” in a similar sense, because doing so will lead to unsupported claims of expanded judicial authority and concomitant tension between branches of government. Goldsworthy thinks it best in these circumstances that the courts proceed cautiously and defer to Parliament.

The exchange between Goldsworthy and Allan in this volume, like many of the other implicit and explicit debates contained in these chapters concerning common law rules, common law reasoning, and common law constitutionalism, will not end here. Indeed, it would be a shame if it did. The benefits of theoretical, historical, doctrinal, and comparative analysis within common law systems, among common law systems, and between common law and other legal systems depend upon the exchange of ideas and the formulation of arguments far more than the resolution of particular disputes. In this respect, the larger debates themselves mirror the process of the common law.

COMMON LAW RULES

Judges as Rule Makers

LARRY ALEXANDER AND EMILY SHERWIN

The sources of law recognized by common law courts are generally understood to include not only legislation and constitutions but also prior judicial decisions. Lawyers rely on judicial precedents in advising clients, and courts cite precedents in their opinions. Yet exactly what courts do, or should do, with precedents is a surprisingly complex problem.

In this chapter, we outline competing views of the proper role of precedent in judicial decision making and defend one such view.¹ Our position is that, subject to certain qualifications, courts can best serve the ends of the legal system by treating rules announced in past cases as binding. In other words, courts should apply previously announced rules to present cases that fall within the rules' terms even when the courts' own best judgment, all things considered, points to a different result.²

In defending this approach to precedent rules, we adopt the point of view of an imaginary authority designing a legal system.³ We assume that the subjects of this legal system share a set of general aims and moral values but do not

¹ In this chapter, we address the problem of "horizontal" precedent, in which the precedent court and the later court are either the same court or courts of equal rank. When a hierarchy of courts is in place within a legal system, there are additional reasons for precedential constraint. See Larry Alexander, "Precedent" in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 1996), 512.

² We have described and defended this approach to precedent in earlier writings. See Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (Duke University Press, 2001), 137–56; Alexander, "Precedent" in Patterson, *Companion to Philosophy of Law and Legal Theory*; Larry Alexander, *Constrained by Precedent*, 63 Southern California Law Review 1 (1989).

³ On the gap in perspective between a governing authority issuing rules and individuals who are subject to the rules, see Alexander and Sherwin, *The Rule of Rules*, 53–95; Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press, 1991), 128–34. We define coordination errors broadly to mean any misallocation of resources or other miscalculation of reasons for action that results from uncertainty about what others will do.

always agree on what these aims and values require in particular settings.⁴ Accordingly, the dominant end of the legal system, and the reason why its subjects have enlisted our imaginary authority to design it, is to settle peacefully and correctly the controversies that arise over how best to carry out shared aims and values in the course of daily life.

With these assumptions in mind, we first consider the inevitable consequences of prior judicial decisions. We then set out leading positions on precedent and defend a rule-oriented approach. Finally, we address some details and necessary qualifications of our favored approach.

I. Moral Consequences of Judicial Decisions

We assume that judicial decisions in the legal system we are considering are publicly accessible – not only are the specific outcomes a matter of record, but in addition courts issue opinions in which they describe the facts presented and explain the reasons for their conclusions. Given this form of publicity, a court cannot defensibly ignore prior judicial decisions because prior decisions alter the decision-making landscape.

The most significant moral consequences of judicial decisions fall under the heading of reliance. Reliance enters the picture in several ways. Most obviously, the parties to the original controversy must conform their behavior to the terms of the decision. Disputants A and B, having litigated a point and complied with the remedial orders of the court, should not face the possibility that their dispute will be reopened.

Apart from the immediate impact on parties, in a system of public decisions, others who observe the outcomes of prior cases will tend to expect consistent decisions in the future and will adjust their behavior accordingly.⁵ Actor C, whose activities are similar to the activities of A that were at issue in *A versus B*, is likely to alter his activities if the court in *A versus B* decided adversely to A. Of course, C's expectation of consistency is reasonable only to the extent that courts typically reach consistent decisions; if they regularly disregard prior cases, C's reliance is misplaced. Therefore, the fact that nonparties have relied is not an independent reason for courts to conform to past decisions.

A society seeking to advance shared ends, however, has reason to foster expectations of consistent decision making by courts. A significant source of moral error – possibly the most significant source among individuals of good

⁴ See Alexander and Sherwin, *The Rule of Rules*, 11–25. Our imagined society is stylized and idealized in order to make the case for rules maximally difficult.

⁵ See Stephen R. Perry, *Judicial Obligations, Precedent and the Common Law*, 7 Oxford Journal of Legal Studies 215, 248–50 (1987) (discussing expectations generated by judicial decisions).

will – is lack of coordination.⁶ An actor who wishes to act correctly may be unable to do so if his own best course of action depends on the actions of others whose choices he cannot predict. If the moral merits of D's actions are affected by what C does, then however wise and well motivated D may be, he cannot decide correctly how to proceed unless he knows what C will do. If, however, courts resolve disputes consistently, D can predict that C will observe pertinent decisions and act accordingly. Thus, a practice of consistent decision making, which generates expectations of consistency, serves to reduce moral error. Further, given this independent reason for judicial consistency, the expectations of actors (such as C) become reasonable, and a decision that fails to honor them will inflict harm.

Another reason often cited in favor of consistency with past decisions is that by deciding consistently, courts treat litigants equally.⁷ If a court decides for B in B's dispute with A, and X later does to Y what A did to B, a court judging X *versus* Y should decide for Y to ensure that A and X (and B and Y) are treated alike under law.

Despite the superficial appeal of this argument, we believe it is misguided. One difficulty is that the circumstances of disputes are never identical. In other words, the argument is not really an argument for equal treatment but an argument for the same treatment in cases that are deemed for some substantive reasons to be relevantly similar. If those reasons warranted the decision for B, and if those reasons favor Y to an equal or greater extent, then the court should indeed decide for Y. But notice that on this account, it is the substantive reasons in Y's case, not equality, that are doing the work.

In some cases, of course, each party's case is equally meritorious, so that a court in reaching a decision for one party or the other is simply choosing an outcome in order to end the dispute. In such cases, the decision is essentially an allocative choice, and equality – or, more accurately, comparative justice – may have some bearing. If, however, there are relative moral merits at issue in the dispute between X and Y, so that one party merits a decision in his favor more than the other, we fail to see how equality could justify treating a party in a way the party otherwise does not deserve. The argument for equal treatment of A and X arises only when the second court – the court judging X – believes that

⁶ On the value of coordination, see, e.g., Alexander and Sherwin, *The Rule of Rules*, 56–9; Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), 49–50; Schauer, *Playing by the Rules*, 163–6; Gerald J. Postema, *Coordination and Convention at the Foundation of Law*, 11 *Journal of Legal Studies* 165, 172–6 (1982); Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 *Southern California Law Review* 995, 1006–10 (1989).

⁷ See, e.g., Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 *Columbia Law Review* 1167, 1170–1 (1983); Michael S. Moore, "Precedent, Induction, and Ethical Generalization" in Laurence Goldstein, ed., *Precedent in Law* (Oxford University Press, 1987), 183.

the first court was mistaken and that A should have won. The second court may have reason to pause and consider before reaching this conclusion. Assuming, however, that the second court is both confident and correct, the fact that the first court wrongly decided against A is not in itself – apart from considerations of reliance – a reason for the second court to commit a similar wrong against X.⁸ Ironically, if equal treatment imposed a moral requirement on courts to decide present cases consistently with erroneous past decisions, morality itself would shift over time in the direction of what otherwise would be immorality.

The various considerations we have described in this section – reliance and, for those who reject our conclusions about equal treatment, equality – are reasons why courts should take past decisions into account in reasoning about present cases. They are not necessarily reasons why courts should follow precedent, in the sense of reaching a conclusion that is consistent with the precedent decisions but that differs from their own best judgment, all things considered, regarding the merits of the present case. In other words, reliance and equality are not reasons to treat prior decisions as *authoritative*. They merely represent prior decisions' moral impact on the world.

II. Approaches to Precedent

We begin by describing two models of precedent – the natural model and the rule model – and identifying the flaws inherent in each. Of these, we believe the rule model will produce better decisions in the long run than the natural model. We then take up several alternative models of precedent that attempt to provide constraint but also permit courts to modify or disregard rules when they produce infelicitous results. In our view, none of these alternatives is successful.

A. *The Natural Model of Precedent*

One view of precedent holds that courts should give prior decisions whatever moral weight they intrinsically have in an all-things-considered process of reasoning.⁹ In other words, courts should take into account the reasonable

⁸ See John E. Coons, *Consistency*, 75 California Law Review 59, 102–7 (1987). For more general critiques of equality as a moral ideal, see Peter Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of "Equality" in Moral and Legal Discourse* (Princeton University Press, 1990), 119–23; Christopher J. Peters, *Equality Revisited*, 110 Harvard Law Review 1210 (1997).

⁹ Michael Moore can be read as adopting this stance. See Moore, "Precedent, Induction, and Ethical Generalization" in Goldstein, *Precedent in Law*, 210 ("one sees the common law as being nothing else but what is morally correct, all things considered – with the hooker that among those things considered are some very important bits of institutional history which may divert the common law considerably from what would be morally ideal"). However, Moore also expresses sympathy, at least procedurally, with the model of principles described below. See *id.* at 201.

expectations of actors, including expectations the parties before them may have formed on the basis of prior decisions, and the expectations of nonparties who have planned their activities around past decisions and reasonably expect consistency in the future. Courts should also take into account the societal interest in encouraging activities that depend on expectations of judicial consistency and the capacity of consistent decisions to reduce error by providing coordination. (As we said, we do not believe that equal treatment provides a further reason for consistency with past decisions; but for those who disagree with us on this, equal treatment also weighs in the balance.) This reasoning process, however, never results in a judgment that differs from the court's own conclusion about what decision is best all-things-considered, taking the effects of the past into account. Past court decisions are not authoritative. They have no effect on current decisions apart from their morally relevant consequences (reliance and equality) and, perhaps, their epistemic value.

If judges were perfect reasoners operating with perfect information, this particularistic, all-things-considered moral reasoning would be both ideal and morally obligatory. (We shall henceforth refer to this form of reasoning as "ATC moral reasoning.") Vesting authority in precedents, apart from their natural moral weight, could only displace or distort correct judgment. In fact, however, judges, like any reasoners, are certain to err. It follows that ATC moral reasoning, imperfectly executed, will produce a number of imperfect outcomes.

In addition to lack of information and ordinary lapses of judgment, courts are especially prone to err in gauging the value of protecting and encouraging reliance on past decisions. Judges reason in the context of particular disputes. In any given case, the situation of the parties before the court will be more salient than the expectations of remote actors or the general benefits of settlement.¹⁰ As a result, judicial decisions may fail to provide an adequate basis for coordination.

B. *The Rule Model of Precedent*

An alternative to ATC moral reasoning in deciding cases is to treat rules announced in past opinions as "serious rules."¹¹ A serious rule, as we use the term, is a prescription, applicable to a range of cases, that exercises preemptive

¹⁰ See Amos Tversky and Daniel Kahneman, "Availability: A Heuristic for Judging Frequency and Probability" in Daniel Kahneman, Paul Slovic, and Amos Tversky, eds., *Judgment under Uncertainty: Heuristics and Biases* (Cambridge University Press, 1982) 163–5, 174–8 (demonstrating that human reasoning is affected by a bias in favor of particularly salient facts).

¹¹ See Alexander and Sherwin, *The Rule of Rules*, 145–8 (endorsing a rule model); Schauer, *Playing by the Rules*, 185–7 (endorsing a rule model); Alexander, *Constrained by Precedent* (finding a rule model superior to alternatives); see also Melvin Aron Eisenberg, *The Nature of the Common Law* (Harvard University Press, 1988), 52–5, 62–76 (suggesting that courts generally accept a rule model of precedent, but coupling the rule model with a generous view of overruling powers).

authority over decision makers.¹² Within the domain of a precedent rule, courts are expected to refrain from ATC moral reasoning. The role of the court is to identify the rule (if any) applicable to the dispute at hand, deduce the outcome prescribed by the rule, and decide accordingly. Whether it is rational for courts to apply rules in this manner is another question; we assume that, rationally or not, courts are capable of implementing a rule model of precedent.¹³

Identification of applicable rules, of course, entails interpretation. We assume that interpretation, for this purpose, means discerning the intent of the court that announced the rule.¹⁴ In effect, a rule-oriented understanding of precedent gives prior courts authority to settle future disputes by announcing rules. This settlement authority in turn implies that the resolution intended by the first court is the resolution to be adopted, without further input from later appliers of the rule.

The preemptive authority of serious rules also implies that if two rules conflict in a way that cannot be resolved by interpretation, one rule must be revised or overruled. Serious rules cannot be weighed against one another in context; they can only be obeyed or rejected. On the other hand, serious precedent rules do not provide a complete body of law capable of resolving every case that may arise. We shall return later to the question of how a court should proceed when no prior rule governs the case at hand.

Decision making according to rules laid down in past cases is inherently inferior to *perfect* ATC moral reasoning.¹⁵ One difficulty is the generality of rules: A rule dictates a particular result throughout a range of cases identified by the predicate of the rule. The most that can be hoped for from a general rule is that, overall, fewer (or less grave) errors will occur if the rule is universally followed than would occur if all persons subject to the rule acted on their own best judgment employing ATC moral reasoning. A rule may meet this

¹² On the essential nature of rules, see Alexander and Sherwin, *The Rule of Rules*, 26–35, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979), 21–2, 30–3; Schauer, *Playing by the Rules*, 4–6, 38–50, 121–2. Whether it is rational, or even psychologically possible, to follow rules in this way is another question.

¹³ See Heidi M. Hurd, *Challenging Authority*, 100 *Yale Law Journal* 1011 (1991) (rejecting the possibility that rules can preempt reasoning); Jason Scott Johnston, “Rules and the Possibility or Social Coordination” in Linda Ross Meyer, ed., *Rules and Reasoning: Essays in Honour of Fred Schauer* (Hart Publishing, 1999), 109 (presenting an economic analysis of rule following); Michael S. Moore, *Authority, Law, and Razian Reasons*, 62 *Southern California Law Review* 827, 873–883 (1989) (rejecting the capacity of rules to exclude reasons for action but suggesting that actors can limit their deliberation); Scott J. Shapiro, “Rules and Practical Reasoning” (unpublished Ph.D. dissertation, Columbia University) (1996), 138–206 (suggesting that individual reasoners can commit themselves to comply with rules).

¹⁴ We have defended this assumption at length elsewhere. See Alexander and Sherwin, *The Rule of Rules*, 96–122 (relying on a conception of intent that includes inchoate, but not hypothetical, intentions).

¹⁵ See Schauer, *Playing by the Rules*, 49–50 (discussing entrenchment and the overinclusive and underinclusive nature of rules).

criterion of overall improvement on unconstrained reasoning, thus qualifying as a sound and desirable rule, and nevertheless produce the wrong result in some of the cases it governs. This consequence is inevitable; it cannot be avoided by exempting those cases in which the rule yields an incorrect result, because whoever is charged with identifying exempt cases is subject to the same errors of individual judgment that the rule is designed to preempt. In other words, there will be cases in which good precedent rules produce bad results.

In addition, an approach to precedent that treats rules announced in prior cases as binding on later courts can entrench rules that are substantively undesirable – that is, undesirable apart from their necessary over- and underinclusiveness. Rules may fail to improve on unconstrained ATC moral reasoning, either because they were wrongly conceived at the outset, or because changed circumstances have made them obsolete. Unless the authority of such a rule is qualified in some way, it will nevertheless stand as a precedent that preempts ATC moral reasoning by the court.

Moreover, the nature of adjudication raises special risks that rules laid down in judicial opinions will not satisfy the criterion of net benefit. Courts announce rules in the course of resolving particular disputes. Evidence, arguments, and the minds of judges are attuned to the facts at hand, while other situations covered by potential rules remain comparatively obscure.¹⁶ As a result, courts are not ideal rule makers.

Bearing these difficulties in mind, we nevertheless believe that a system of authoritative rules will yield better results than a system of ATC moral reasoning. We have noted that individuals tend to rely on judicial decisions and, more important, that if courts protect reliance by reaching consistent decisions over time, all actors will obtain the benefits of coordination. Enabling courts to lay down authoritative rules contributes in two ways to protection of reliance. First, the generality of rules increases the scope of what has been dependably settled. Second, the preemptive authority of precedent rules ensures that reliance will not be undervalued in future decision making. ATC moral reasoning, perfectly performed, takes account of the need to protect and encourage reliance; however, as we have noted, courts focused on particular disputes may lose sight of remote considerations of this kind. Preemption of natural reasoning within the scope of precedent rules eliminates that danger.

Several other practical benefits follow from the broader settlement made possible by precedent rules and from the constraints that authoritative rules place on courts. Entrenched rules can reduce the cost of judicial decision making and, at least in some circumstances, encourage private settlement.¹⁷ By limiting

¹⁶ See Tversky and Kahneman, “Availability” in Kahneman, Slovic, and Tversky, *Judgment under Uncertainty*.

¹⁷ See Tversky and Kahneman, “Availability” in Kahneman, Slovic, and Tversky, *Judgment under Uncertainty*.

discretion, precedent rules also reduce the opportunity for bias in decision making and correspondingly increase public faith in the impartiality of courts.¹⁸

Overall, therefore, we believe that authoritative precedent rules are, or at least have the capacity to be, superior to case-by-case ATC moral reasoning. Another way to put this is that, although binding precedent rules will lead some courts to err when they otherwise would not, an authority overseeing the judicial system as a whole and observing the rate of error in case-by-case ATC moral reasoning would prefer that all courts obey precedent rules. Our conclusion is subject to refinements to be discussed below. First, however, we should consider whether any other approach to precedent, less strictly preemptive of judicial reasoning, can provide a useful compromise between case-by-case ATC moral reasoning and rules.

C. Alternatives

Courts and theorists have resisted a strict rule-based approach to precedent for several reasons.¹⁹ As already described, serious rules limit particularized moral decision making by courts, curtailing their ability to correct erroneous and unjust results. Rules also stand in the way of legal innovation.²⁰ Finally, a

¹⁸ See Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge Jr. and Philip P. Frickey, eds.) (Foundation Press, 1994), 568.

¹⁹ See Robert S. Summers, "Precedent in the United States (New York State)" in D. Neil MacCormick and Robert S. Summers, eds., *Interpreting Precedents: A Comparative Study* (Dartmouth/Ashgate, 1997), 378–94, 401–4 (reviewing the variable practices and attitudes of American judges in the United States, with illustrations from the New York Court of Appeals). Characteristic twentieth-century American views of precedent can be found in Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921); Hart and Sacks, *The Legal Process*, 545–96; Edward H. Levi, *An Introduction to Legal Reasoning* (University of Chicago Press, 1949), 1–6; Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana Publishing, 1960), 66–9, 186–9; *Conference: The Status of the Rule of Judicial Precedent*, 14 *University of Cincinnati Law Review* 203 (1940) (in which most participants agreed that the doctrine of precedent does not require strict adherence to precedent rules).

In the nineteenth century, the House of Lords endorsed what appeared to be a rule model of precedent. *Beamish v. Beamish*, (1861) 9 HLC 274; *London Tramways v. London County Council*, [1898] AC 375. However, the House frequently distinguished cases (a practice we discuss below), and the House ultimately abandoned its position. See Zenon Bankowski, D. Neil MacCormick, and Geoffrey Marshall, "Precedent in the United Kingdom" in MacCormick and Summers, *Interpreting Precedents*, 326. The English approach had been much criticized as a source of rigidity, injustice, inconsistency, and disingenuous interpretation. See, e.g., Hart and Sacks, *The Legal Process*, 575 (asking, of the House of Lords: "Has it fulfilled its historic mission as the voice of legal reason in the Anglo-American world? Or become the degraded prisoner and pettifogging distinguisher of its own precedents?").

²⁰ See Levi, *An Introduction to Legal Reasoning*, 2 (change in rules from case to case is "the indispensable dynamic quality of law").

rule-based approach to precedent casts courts as rule makers and so contradicts the traditional assumption that courts apply rather than make law.²¹

These concerns have led to a variety of alternative descriptions of the role of precedent in decision making, in which prior decisions constrain later courts but do not preempt judicial reasoning and innovation. In differing forms, compromise positions of this kind have been widely embraced. For purposes of discussion, we divide them, roughly, into two groups: result-based approaches to precedent and coherence-based approaches to precedent. In our view, neither group yields an effective compromise between ATC moral reasoning and precedent rules.

1. THE RESULT MODEL OF PRECEDENT. In its most typical form, what we call the result model of precedent recognizes prior decisions as binding but also permits courts to distinguish precedent cases that differ factually from the cases before them.²² This approach to precedent is appealing because it appears to accommodate the evolution of law within a framework of constraint. Courts must treat prior decisions as correct and reach analogous results when faced with analogous problems. When precedents are distinguishable, however, later courts are free to reach contrary results, even when prior opinions state a rule that appears to govern the later dispute and demands a different result. Not surprisingly, this view of precedent was popular among American Legal Realists, who sought to free legal reasoning from what they viewed as an artificial concern with doctrinal rules.²³

The practice of distinguishing precedents is often characterized as a qualified form of rule following. Rules established by prior courts are authoritative, except that later courts may modify them by narrowing their scope. The later court,

²¹ See A. W. B. Simpson, "The *Ratio Decidendi* of a Case and the Doctrine of Binding Precedent" in A. G. Guest, ed., *Oxford Essays in Jurisprudence* (Oxford University Press, 1961), 148, 160–3, 167; A. W. B. Simpson, "The Common Law and Legal Theory" in A. W. B. Simpson, ed., *Oxford Essays in Jurisprudence (Second Series)* (Oxford University Press, 1973), 77, 84–6.

²² This approach to precedent is defended analytically in Raz, *The Authority of Law*, 183–9; John F. Harty, *The Result Model of Precedent*, 10 *Legal Theory* 19 (2004); Grant Lamond, "Precedent as Decision" (unpublished manuscript on file with the authors). See also Steven Burton, *An Introduction to Law and Legal Reasoning* (2nd ed.) (Little, Brown and Co., 1995), 27–41 (defending analogical reasoning from results); Levi, *An Introduction to Legal Reasoning*, 1–19 (same).

²³ See, e.g., Levi, *An Introduction to Legal Reasoning*, 1–19; Llewellyn, *The Bramble Bush*, 72–5 (arguing that courts are free either to maximize the effect of a precedent decision by applying a stated rule or to minimize its effect by distinguishing cases with dissimilar facts, as they wish). See generally, Brian Leiter, "American Legal Realism" in Martin P. Golding and William A. Edmundson, eds., *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell, 2005). Leiter makes the point that Legal Realists were not uniformly hostile to rules. Yet, they did have in common the belief that existing legal rules failed to constrain judicial decisions and masked the considerations that actually influenced judges.

in other words, devises a new version of the rule that supports the result of the precedent case but excepts the later case based on some critical new fact.²⁴

Suppose, for example, that the precedent case (*P*) involved facts of types *a*, *b*, *c*, *d*, and *e*. The court presiding over *P* reached result *X* and announced a rule, “If *a*, *b*, and *c*, then *X*.” Facts *d* and *e* were mentioned but not discussed. Later, a new case *N* arises, which involves facts of types *a*, *b*, *c*, *d*, and *f*. The later court might distinguish its case by noting that it involves the new fact of type *f* and restate the precedent rule as “If *a*, *b*, and *c*, and not *f*, then *X*.” Or it might distinguish its case by noting that it does not involve fact type *e* and restate the rule as “If *a*, *b*, *c*, and *e*, then *X*.”²⁵

In fact, however, the reference to rules is misleading because, under the approach we are now discussing, rules laid down in prior cases play in reality no part in the reasoning of later courts. No precedent rule can be at once determinate enough to dictate results and comprehensive enough to encompass all the circumstances of any given dispute. It follows that every new case will present some fact that is not specified by the predicate of the precedent rule and that, accordingly, can serve as a distinguishing fact.²⁶ If every later court is free to distinguish every precedent rule, then the authority of precedent decisions, if any, must lie in their facts and results, not in any rules announced by the precedent court.²⁷ In distinguishing a prior decision, the later court is simply comparing fact set *a*, *b*, *c*, *d*, and *e* with fact set *a*, *b*, *c*, *d*, and *f*. If the two sets differ, as they inevitably will, the new case can be distinguished and the

²⁴ For example, Raz treats the practice of distinguishing precedents as a practice of modifying precedent rules. Accordingly, he imposes two conditions: (1) the modified rule must be the rule laid down in the precedent restricted by the addition of a further condition for its application; (2) the modified rule must be such as to justify the order made in the precedent. Raz, *The Authority of Law*, 186.

²⁵ This format is taken roughly from Raz. See *The Authority of Law*, 183–9. Raz is careful to distinguish between the *facts* of cases, e.g., *a*, *b*, and *c*, and the *fact types* identified in rules, e.g., *A*, *B*, and *C*.

²⁶ See, e.g., Llewellyn, *The Bramble Bush*, 72–3 (“This rule holds only of redheaded Walpoles in pale magenta Buick cars.”).

Raz attempts to avoid this conclusion by maintaining that the new rule must be a restricted version of the precedent rule and must *justify* the outcome of the precedent case; it is not enough that the new rule simply be *compatible* with the outcome of the precedent case. The example Raz gives is that if the precedent case announced a rule “if *A*, *B*, and *C*, then *X*” on facts of types *a*, *b*, *c*, *d*, and *e*, a later court adjudicating facts of types *a*, *b*, *c*, *d*, *f*, and not *e* could adopt a distinguishing rule “if *A*, *B*, *C*, and *E* then *X*,” but could not adopt a rule “if *A*, *B*, *C* and not *D*, then *X*.” Raz, *The Authority of Law*, 186–7. Raz adds, however, that the later court could legitimately adopt a distinguishing rule if *A*, *B*, *C*, and not *F*, then *X*. *Id.* at 187. Our point is that there will always be an *F*. Raz also states that the court should “adopt only that modification which will best improve the rule,” but this admonition is too vague to constrain. He adds further that “[a] modified rule can usually be justified only by reasoning very similar to that justifying the original rule”; however, he does not make clear why this is so. *Id.*

²⁷ See Horty, *The Result Model of Precedent*, 10 *Legal Theory* at 21.

precedent rule ignored. Hence our description of this form of judicial reasoning as the “result model” of precedent.

This approach to precedent, however, raises the question of whether results – outcomes in the context of particular facts – can actually provide any constraint on later decisions. The most plausible form of constraint by results is an *a fortiori* effect: If the reasons for the outcome reached by the precedent court are at least as strong in the context of the later case as they were in the context of the precedent case, then the later court must reach a parallel outcome despite its believing that, in the absence of the precedent, the outcome is wrong. In other words, precedents are distinguishable only when the reasons for the precedent outcome are weaker in the later case than in the precedent case.²⁸ *A fortiori* reasoning, however, suffers from a number of difficulties, both in its execution and in its systemic effects.

To determine whether a new case presents weaker or stronger reasons for a particular outcome than a prior case, the court must assign weights, and the outcomes toward which those weights incline, to the various facts present in each case.²⁹ An initial difficulty is that the court’s access to the facts of the precedent case is limited to the description provided by the precedent court. Suppose, for example, that the opinion in the precedent case states only that the plaintiff was injured while driving a car manufactured by the defendant and approves a judgment for the defendant. If, in future cases, courts feel bound to follow the precedent and deny all claims by injured drivers against car manufacturers, then a clever precedent court (or an unthinking precedent court) will have had a powerful impact on future cases simply by minimizing its description of facts.³⁰

More likely, however, later courts will assume that facts not mentioned by the precedent court were not present and therefore qualify as grounds for

²⁸ For a defense of validity of *a fortiori* reasoning, within limits, see Harty, *The Result Model of Precedent*. For criticism, see Alexander, *Constrained by Precedent*, 63 Southern California Law Review at 29–30.

²⁹ See Harty, *The Result Model of Precedent*, 10 Legal Theory at 23–7 (modeling *a fortiori* reasoning with a set of equations based on the “polarities” of facts). The analysis in the following paragraphs tracks arguments presented in Alexander, *Constrained by Precedent*, 63 Southern California Law Review at 34–7, 42–4.

³⁰ Harty points out that the effect of a spare description differs from the effect of a rule. For example, a precedent court mentions facts a (tending in favor of the plaintiff), b (tending in favor of the defendant), and c (tending in favor of the defendant), and holds for the plaintiff. It also announces a rule, “if a, b, and c, hold for the plaintiff.” A case then arises involving facts a, b, c, and d (tending in favor of the defendant). This new case is covered by the precedent rule, but is not an *a fortiori* case based on the precedent result. Harty, *The Result Model of Precedent*, 10 Legal Theory at 28–9. Thus, on this understanding of the effect of the precedent decision, the result model does not collapse into the rule model, but it does permit the precedent court to control a wide range of future cases by limiting its statement of facts.

distinguishing the new case.³¹ If so, the constraint imposed by the precedent case is minimal, if not illusory. We have noted that a later court can almost always identify some fact about its own case that does not appear in the record of the precedent case.³² Given that, by definition, the later court believes the precedent decision was wrong, it is also very likely to conclude that these new facts tip the balance in favor of a new result. For example, a precedent opinion may reveal that the plaintiff was injured when a car marketed with defective wheels collapsed on the highway. In a later case, the plaintiff is injured when a high-priced car marketed with defective wheels collapses on the highway. If the precedent court decided for the defendant, and the later court wishes to decide for the plaintiff, the later court need only assume that the fact “high-priced” did not exist in the precedent case because the precedent opinion did not mention it.

This effect might be curbed by applying a notion of relevance: The price of the car simply is not relevant to the outcome of the case. Yet, it is difficult to see how a court could make this determination of relevance without referring to some *standard* by which relevance is to be gauged. That standard might be an unstated legal *rule* found in the precedent cases: The price of cars is irrelevant according to the rule that duties of care do not vary with price. A result-based approach to precedent, however, is supposed to operate without the aid of rules. Otherwise, it is merely a version of the rule model of precedent that employs implicit rules found in precedent cases as well as explicit rules. (We discuss the use of implicit rules in Section III.1.)

Alternatively, the court might employ as its standard of relevance some *principle* that it draws from past cases taken as a whole. This alternative is the “model of principles” that we discuss in the following subsection, so we shall defer our criticisms of this model until then. Here it suffices to say that if the model of principles fails, as we argue it does, and the result model is not merely a version of the rule model that admits consideration of implicit rules, then the result model lacks the standards of relevance necessary for precedents to constrain subsequent courts.

A second, related puzzle is what exactly it means to say that a fact points toward a particular outcome. Presumably, a fact points toward a judicial outcome when a decision in favor of one party or another, given that fact, would produce good in the world or would advance or conform to a principle deemed to be correct. Making this determination is not a simple task. The court must either engage in a complex process of reasoning (is it fair and efficient to support higher expectations of safety in consumers who pay high prices?) or refer, again, to an unstated rule (duties of care vary, or do not vary, with price). If

³¹ Raz proposes that later courts may assume that facts not mentioned were not present. Raz, *The Authority of Law*, 187.

³² See note 26 and accompanying text.

we exclude the possibility of referring to rules, it follows that a result model of precedent will not significantly reduce the errors of natural reasoning.

Assuming the court has access to a useful array of facts and can assign tendencies to those facts, there is also the matter of weight. To compare the strength of different facts for or against an outcome, the court must employ a metric that assigns weight to the facts in a common currency. If there is no such metric – that is, if the various facts key to multiple principles and policies that are not lexically ordered or reducible to a common master principle, then comparison is not possible.³³

If there is a common metric, such as utility or equal welfare, the determination when one case is controlled by another becomes purely quantitative. Calculation of weight is now possible in principle, but incorrect precedents will yield pernicious results. Suppose, for example, that we measure the effects of judicial outcomes by the number of utiles they produce. In a precedent case, a court mistakenly decided for the defendant when a decision for the plaintiff, given the array of pertinent facts, would have produced ten more utiles. A *fortiori* analysis suggests that from this point onward, courts should decide for the defendant in *all* cases in which the balance of utility favors the plaintiff by ten or fewer utiles, no matter how unrelated the cases may seem. In this way, a tort case can be a precedent for a contract case that bears no resemblance to it at all.

Under a result model that applies a common metric for comparison of cases, the consequences of incorrect decisions are systemic. Suppose a precedent court incorrectly decided that set of facts *a*, which favored the plaintiff, outweighed set of facts *b*, which favored the defendant. A new case arises involving set of facts *x* for the plaintiff and set of facts *y* for the defendant, and the court decides that *y* outweighs *x*. The court may nevertheless be constrained to hold for the plaintiff if *x* outweighs *a* and *b* outweighs *y*. In other words, if there is in fact a common metric by which facts can be weighed and cases compared across all of law, then even a few erroneous decisions will render the whole of legal doctrine incoherent.

Moreover, the body of precedents is sure to include cases that were correctly decided as well as cases that were incorrectly decided. If this is so, then every later case will be constrained in opposite and irreconcilable directions. Suppose that in a precedent case in which the balance of utility favored the plaintiff by

³³ Horty argues that precedents can have a *fortiori* effect in the absence of a metric for comparing the weight of different facts. Specifically, if a precedent case is decided for the plaintiff, and if all the facts that supported the plaintiff in the precedent case are present in a later case, *and* all the facts that support the defendant in the later case were present in the precedent case, then the later case follows a *fortiori* from the precedent case. Horty, *The Result Model of Precedent*, 10 *Legal Theory* at 23–4. This seems correct, but the constraint provided by the precedent is minimal. All that is needed to free the later court to decide as it believes best is a single new fact in support of the defendant. Moreover, Horty concedes that within the narrow range of precedential constraint, inconsistent precedents might lead to cases that are a *fortiori* for both plaintiff and defendant. *Id.* at 26.

one utile, the plaintiff won. In another precedent case, the balance of utility favored the plaintiff by ten utiles, but the defendant won. Now all later cases in which the balance of utilities favors the plaintiff by between one and ten utiles are a *fortiori* cases for both plaintiff and defendant.

The result model of precedent has the virtue of conforming to courts' own descriptions of their treatment of prior decisions. Courts purport to study and follow precedents, and they are at pains to distinguish precedents they wish to avoid. Yet whatever courts may say, they cannot be applying the result model of precedent in the way its logic dictates. Most likely, the process of distinguishing cases is a form of ATC moral reasoning, or rule-sensitive particularism,³⁴ coupled with a conservative tendency that results from the courts' *belief* that they are constrained by the results of prior cases.

2. THE MODEL OF PRINCIPLES. Another approach that has won support among theorists holds that courts should resolve disputes on the basis of legal "principles" derived from past decisions.³⁵ A court faced with a particular dispute surveys prior decisions and either discerns or constructs a principle or underlying reason that explains those decisions. The resulting principle provides an authoritative source of law in the case now before the court. If the present case appears to fall within the terms of a previously announced judicial rule, the principle can also serve as a ground for distinguishing and limiting the rule.³⁶ At the same time, legal principles do not govern outcomes in the all-or-nothing manner of rules. The body of legal material may suggest several valid but conflicting principles relevant to a given dispute, in which case the court must determine the principles' relative weights as applied to the dispute.³⁷

This account of judicial decision making implies the existence of a body of law shaped and defined by internal coherence.³⁸ By identifying principles

³⁴ This term is Frederick Schauer's. See Schauer, *Playing by the Rules*, 94–100. For skepticism about the ability of rule-sensitive particularism to secure the benefits of rules, see Alexander and Sherwin, *The Rule of Rules*, 61–8.

³⁵ See Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986), 240–50, 254–8; Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), 22–31; Hart and Sacks, *The Legal Process*, lxxix–lxxx, 545–96; Roscoe Pound, "Survey of the Conference Problems" in *Conference*, 14 University of Cincinnati Law Review at 324, 328–31.

³⁶ See Dworkin, *Law's Empire*, 257–8 (suggesting that judges should treat both rules and principles articulated in the past as "provisional," to be reconsidered in light of further insight into principle); Dworkin, *Taking Rights Seriously*, 37 (suggesting that principles can justify a change in rules).

³⁷ See Dworkin, *Taking Rights Seriously*, 25–7 (a principle "states a reason that argues in one direction, but does not necessitate a particular decision"); Pound, "Survey" in *Conference*, 14 University of Cincinnati Law Review at 329 ("a principle doesn't lay down any definite detailed state of facts and doesn't attach any definite legal consequence").

³⁸ See Dworkin, *Law's Empire*, 225 ("The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception

that connect and explain prior decisions and extending those principles to new disputes, courts form past and present cases into a consistent whole. Moreover, once a foundational mass of decisions is in place, the obligation to seek coherence provides a solution (although not, perhaps, a unique solution) to every case that may arise. Courts can determine answers to every new dispute by reference to the principles immanent in prior decisions.³⁹

Like the result model of precedent, the model of principles is designed to strike a compromise between ATC moral reasoning and serious precedent rules. Yet result-based and principle-based approaches differ in several ways. First, the model of principles takes account of a broader array of legal material than the result model. The result model limits the precedential authority of prior cases to the combination of revealed facts and outcomes; rules announced by prior courts are irrelevant.⁴⁰ Under the model of principles, announced rules, as well as justifying reasons, count as evidence of legal principles, although announced rules are not authoritative *as rules*.⁴¹ Second, as noted, the authority of legal principles under a principle-based model of precedent is not absolute within any range of cases. Under the result model, the conclusion that a later case follows *a fortiori* from the facts and outcome of a prior case puts an end to deliberation. A legal principle, however, may apply to a given case and yet fail to dictate an outcome if other competing principles are also in play.⁴² Finally,

of justice and fairness.”). See also Dworkin, *Law's Empire*, 228–32; Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 California Law Review 369, 370 (1984) (associating Dworkin with coherence theory); Barbara Baum Levenbook, *The Meaning of a Precedent*, 6 Legal Theory 185, 233–4 (2000) (interpreting Dworkin's theory of precedent as a coherence theory). Cf. Joseph Raz, *The Relevance of Coherence*, 72 Boston University Law Review 273 (1992) (discussing and criticizing coherence theories in law). Raz alternately treats Dworkin's work as an example of coherence theory and suggests that Dworkin may not be committed to a coherence-based theory of adjudication. *Id.* at 315–21.

³⁹ See Dworkin, *Taking Rights Seriously*, 82–4 (elaborating the “rights thesis”); Hart and Sacks, *The Legal Process*, 569 (referring to the common law as “a process of settlement which tries to relate the grounds of present determination in some reasoned fashion to previously established principles and policies and rules and standards”).

⁴⁰ See text accompanying note 27.

⁴¹ See Hart and Sacks, *The Legal Process*, 569; Llewellyn, *The Bramble Bush*, 191 (commending the “Grand Tradition” of appellate decision making in which opinions “make sense and give guidance for tomorrow for the *type of situation at hand*”) (emphasis in original); Pound, “Survey” in *Conference*, 14 University of Cincinnati Law Review at 330–1 (indicating that principles are gradually formulated by series of courts, through expressions of reasoning in opinions). Dworkin is ambiguous on this question. For example, he states that “Fitting what judges did is more important than fitting what they said,” and that “an interpretation [of precedent] need not be consistent with past judicial attitudes or opinions, with how past judges saw what they were doing, in order to count as an eligible interpretation of what they in fact did.” Dworkin, *Law's Empire*, 284. He adds, however, that fit with judicial opinions is “one desideratum that might be outweighed by others.” *Id.* at 285. Cf. Dworkin, *Taking Rights Seriously*, 110–15 (referring to the “enactment force” and gravitational force” of precedents).

⁴² See note 37.

the model of principles gives wider-reaching effect to precedent decisions than does the result model. The force of precedent under a result model is limited to the implications, if any, of overlapping facts. In contrast, the set of principles derivable from legal data provides a comprehensive, although changeable, body of authority for future decisions.⁴³

A number of prestigious legal scholars have endorsed and developed the idea of decision making according to legal principles. Roscoe Pound incorporated legal principles into his functionalist philosophy of law, arguing that law was composed not only of rules but also of higher-order principles that served as “authoritative starting point[s] for legal reasoning in all analogous cases.”⁴⁴ In their process-based approach to law, Henry Hart and Albert Sacks identified “reasoned elaboration” of principles found in the body of law as the hallmark of judicial decision making.⁴⁵

The idea of legal principles was later revived by Ronald Dworkin, who made it a cornerstone of his conception of “integrity” in law. According to Dworkin, an ideal judge employs reason and moral judgment to develop the best decisional principles that can satisfy a requirement of “fit” with prior decisions and then decides the case before him accordingly.⁴⁶ In other words, Dworkin’s judge seeks coherence with existing precedents but also engages in moral reasoning to reach the best result possible within the constraint that coherence provides.⁴⁷

Legal principles have several seeming advantages over binding rules. Courts are constrained by law, but they are not required to suppress their best moral

⁴³ See note 39.

⁴⁴ Pound, “Survey” in *Conference*, 14 University of Cincinnati Law Review at 331.

⁴⁵ See Hart and Sacks, *The Legal Process*, lxxix, 568–70. See also Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 Oxford University Commonwealth Law Journal 1, 11–17 (2003) (suggesting that the common law conception of precedent, as it stood in the seventeenth century, was based in part on a perceived obligation to maintain coherence among decisions). Postema notes a difference of opinion as to whether legal reason relied on principles or simply on the pattern of past decisions. His own interpretation is that precedents were authoritative in the sense that they provided illustrations of sound legal reason and guides for decision. See id. at 14–17.

⁴⁶ See Dworkin, *Law’s Empire*, 230–2, 254–8; Dworkin, *Taking Rights Seriously*, 115–18. Dworkin’s system may be best categorized as a hybrid that combines elements of the result model and the model of principles. Legal principles play a central role, and judges do not mechanically calculate the implications of prior outcomes. At the same time, Dworkin suggests at times that the outcomes of cases, rather than rules or explanations set forth in prior opinions, are the primary data from which legal principles are drawn. See, e.g., Dworkin, *Law’s Empire*, 284–5. A related feature of his approach is that each judge constructs a principle for the purpose of decision, rather than applying principles identified by prior courts. See, e.g., id. at 255–6. If principles are the work of current judges without input from the explanations prior judges provided for their decisions, the only authoritative component of a prior decision is its outcome, given its array of facts.

⁴⁷ Bankowski, MacCormick, and Marshall aptly refer to this as a “determinative” theory of precedent: Courts neither deduce results from prior opinions nor decide independently what is best; instead, they determine the best result consistent with prior cases. Bankowski, MacCormick, and Marshall, “Precedent in the United Kingdom” in MacCormick and Summers, *Interpreting Precedents*, 332.

judgment in resolving disputes; instead, they participate in the formulation of governing principles and weigh principles that conflict.⁴⁸ The problem of erroneous or obsolete precedent rules is solved by locating the authority of prior decisions in more malleable precepts of a higher order. Thus, law can evolve with society, but the pace of change is controlled because past and present are linked by common principles. Finally, legal principles provide guidance for courts, and continuity in law, in cases that are not governed by any preexisting rule.

In our view, this appealing picture is misleading. Rather than provide a happy compromise, legal principles combine the worst features of ATC moral reasoning and of binding precedent rules, while at the same time eliminating the advantages of both.

Legal principles immanent in the body of law are in several ways less determinate than precedent rules posited by prior courts. Most obviously, principles tend to be more vague and more dependent on value-laden terms than posited rules that prescribe results for future cases. For example, the principle that no one should profit from a wrong does not provide determinate guidance because it leaves undefined the notions of a wrong and of profit. In comparison, a rule stating that an heir convicted of murdering the ancestor from whom he hopes to inherit may not claim a share of the ancestor's estate is considerably easier to apply. The rule may be inconveniently underinclusive, as when the murderer kills himself before trial, but it avoids an excursion into the open-ended concept of wrongdoing.

Beyond the problem of form, judgments about coherence within the body of law are likely to be both inaccessible and unstable. Multiple principles may qualify as plausible explanations for existing legal material, leaving room for disagreement about which best fits the material as well as which is most desirable overall.⁴⁹ Moreover, even when the set of eligible principles is uncontroversial, competing principles within that set must be weighed. We have noted that legal principles are not definitive of outcomes: They are "starting points" for reasoning, or considerations to be given "weight," that may conflict with one another in a particular case.⁵⁰ The logical process by which judges should weigh two or more conflicting principles in context is elusive, and in any event it seems no less prone to controversy and error than ATC moral reasoning about the best result.⁵¹

⁴⁸ See Dworkin, *Law's Empire*, 255.

⁴⁹ See Levenbook, *The Meaning of a Precedent*, 6 *Legal Theory* at 236–8 (tracing consequences of "the subsumed view that the significance of anything in law depends on relationships to a lot of other things"). Dworkin admits that interpretations of law, on his account, may differ substantially. See Dworkin, *Law's Empire*, 256–7.

⁵⁰ See note 37.

⁵¹ For an effort to systematize this process, see S. L. Hurley, *Coherence, Hypothetical Cases, and Precedent*, 10 *Oxford Journal of Legal Studies* 221 (1990) (suggesting that settled cases, actual and hypothetical, provide guidance about the relative weight of principles in particular factual settings).

A further source of indeterminacy is that the data from which principles are drawn (decisions and opinions) change with each new decision. Not only is the new decision added to the body of law,⁵² but some number of existing decisions may need to be dropped or discounted as a result of inconsistency. The requirement of coherence or “fit” with existing legal data cannot be a requirement of perfect harmony with all prior decisions: To be workable, it must be limited to some threshold proportion of decisions, beyond which judges are free to disregard recalcitrant cases.⁵³ In fact, a judge seeking the best qualifying principle can be expected to discard as many of the cases she disapproves of as the threshold of fit will allow.⁵⁴ And that in turn means that each new decision will open the way for a new principle by rendering another past case eligible for discard.

For these reasons, legal principles lack the capacity of rules to curb error, provide settlement and coordination, and protect and encourage reliance. Moreover, legal principles are generally understood to override precedent rules. Therefore, a coherence model of precedent that relies on legal principles eliminates the settlement and coordination benefits of rules.

At the same time, legal principles, like rules, are inherently inferior to ideal ATC moral reasoning. The requirement of coherence or fit limits the ability of courts to follow their own best judgment in resolving disputes. The court cannot disregard all past decisions it deems to be wrong – if it could, the body of decisions would exert no precedential force and the court would simply be engaged in pure ATC moral reasoning. Accordingly, the court must build or adduce its principle from data that include at least some errors by past courts.

In other words, legal principles are not moral principles, arrived at through a process of reflective equilibrium that starts from intuition about correct results. They are precepts that incorporate at least some results that the current court believes to be wrong. The odd task assigned to the court is to determine what principles would be correct moral principles in a world in which certain erroneous decisions were correct.⁵⁵ Thus, if we assume that legal principles in fact

⁵² See Kress, *Legal Reasoning and Coherence Theories*, 72 California Law Review at 380–3 (discussing the “ripple effect”).

⁵³ Dworkin makes this explicit in his discussion of a threshold of “fit.” See Dworkin, *Law’s Empire*, 230, 255.

⁵⁴ The changeability of legal principles is particularly apparent in Dworkin’s account, in which legal principles are not passed down from court to court but are remade as each judge identifies the best principle that fits the pattern of prior decisions. See *Law’s Empire*, 255–6. Others who argue for decision on the basis of legal principles appear to have in mind that principles are passed down from court to court in increasingly reliable form. See Pound, “Survey” in *Conference*, 14 University of Cincinnati Law Review at 330 (“we get gradually a line of decisions which work out a principle”); Hart and Sacks, *The Legal Process*, 569–70.

⁵⁵ See Alexander and Sherwin, *The Rule of Rules*, 147; Alexander, “Precedent” in Patterson, *Companion to Philosophy of Law and Legal Theory*, 509. For a similar suggestion, see Raz, *The Relevance of Coherence*, 72 Boston University Law Review at 307.

exist – that is, that decision making according to legal principles is constrained to some extent by the body of prior decisions – then, like rules, legal principles entrench error. Courts may have more room to correct errors and bring about changes in law than they have in a system of binding precedent rules, but their reasoning is distorted without the compensating settlement value of decision making according to rules.

III. Precedent Rules Revisited

Assume that we are correct in our conclusion that a system of binding precedent rules is superior to a system of precedents that bind only through their results and that leave courts with the power to distinguish precedents. And assume likewise that we are correct that a system of binding precedent rules is superior to a system of precedents based on legal principles. Still, a number of questions remain to be answered. We do not undertake to answer them in full: Our objectives are to identify problems that need to be solved in order to make a system of binding precedent rules attractive and to show that these problems are not so intractable as to disqualify precedent rules as a plausible feature of law.

A. Identification of Precedent Rules

The object of a rule is to settle controversy and provide coordination in cases of uncertainty and disagreement. For that purpose, a rule must be general, covering a range of future cases.⁵⁶ It must also be determinate enough to be applied without direct consideration of the questions it was designed to settle.⁵⁷

Ideally, a precedent rule will appear in this form in the opinion accompanying a previous decision. When this occurs, not only is the rule capable of guiding future decisions, but the court that wrote the opinion is likely to have crafted the rule with future cases in mind. Yet, because courts are reluctant to legislate overtly, explicit precedent rules may be difficult to find. A typical judicial opinion contains a narrative description of facts, a summary of arguments by the parties, and an explanation of the court's decision; but it rarely sets forth canonically an explicit rule for the future.

The rule model of precedent, however, does not necessarily depend on deliberate judicial promulgation of rules in canonical form. A more expansive version of the model would also recognize as authoritative implicit rules derived from judicial opinions. A court's explanation of its reasoning, the facts it particularly emphasizes, and its references to prior cases may reveal that the court endorsed, without explicitly stating, an identifiable rule of decision. If this rule can be

⁵⁶ See Schauer, *Playing by the Rules*, 1–12, 23–7 (defining rules).

⁵⁷ See Schauer, *Playing by the Rules*, 53–62 (discussing the “semantic autonomy” of rules).

discerned with reasonable confidence and restated in canonical form, then it may serve as a serious precedent rule.

The notion of implicit precedent rules is limited in several ways. First, the authority of any rule, including a precedent rule, comes from general agreement among members of society to vest its author with power to settle future controversies; therefore, the force and meaning of the rule are functions of the author's intent.⁵⁸ It follows that an implicit precedent rule must have been understood by the precedent court to occupy a place within the body of law and to govern future cases in the manner of a rule. A precept found by a later court to be immanent in the pattern of past decisions, but not so understood by prior courts, is not a precedent rule. Second, rules must prescribe results. Therefore, for an implicit rule to qualify as a precedent rule, it must have been understood by the precedent court as providing an answer to all disputes that fall within its terms and not simply as a principle to be weighed against other reasons for decision.

Expansion of the rule model to include implicit rules carries some risks. A rule that is not obvious loses much of its capacity to coordinate private conduct. There is also a danger that the precedent court, although it had the rule in mind, did not consider its consequences as carefully as it might have done if engaged in deliberate legislation. As a result, the rule may be poorly designed. Nevertheless, recognition of implicit rules probably is necessary to secure the benefits of a rule model of precedent, given the dominant practices of courts at present. On the other hand, were the desirability of the rule model of precedent to be fully internalized by courts, courts might begin making their rules explicit and crafting them with greater care.

B. Preconditions for Precedential Authority

The benefits of a rule depend on its capacity to curtail error in the range of cases to which it applies. A precedent court may sometimes announce a rule in general and determinate form, but do so very casually. When this occurs the rule is particularly likely to fail in its task of reducing error. If the precedent court did not in fact intend its statement to operate as a rule, no rule exists. If it did intend a rule, but acted without reflection, then without some refinement of the model, the rule is binding on future courts.

One possible strategy to prevent entrenchment of undesirable rules is to screen precedent rules for adequacy of deliberation by studying the process that surrounded their adoption. Briefs and arguments submitted to the precedent court, for example, may reveal that there was no significant adversarial debate

⁵⁸ Our views on these matters are set out in detail in Alexander and Sherwin, *The Rule of Rules*, 11–25 (settlement), 97–101 (intentions). See also Raz, *The Relevance of Coherence*, 72 Boston University Law Review at 295–6 (discussing law as a function of authority).

on the subject of the rule.⁵⁹ If so, a later court could disregard the rule on the ground that it was not formulated with sufficient care.

A condition that focuses on the quality of deliberation by precedent courts, however, may pose dangers to the system of precedent. An investigation of the gravity with which the precedent court approached its rule, particularly when conducted by a later court that believes the rule is about to produce an erroneous result, could undermine the habit of compliance on which any system of rule-based decision making depends. In any event, perhaps because evidence of judicial reflection is not readily available, inquiry into the deliberative background of precedent rules is not a common feature of legal practice.

Another possibility, one that relies on more objective criteria and therefore poses fewer dangers to the habit of following rules, is to screen precedent rules for judicial acceptance. A precedent rule, according to this condition, is not binding on reluctant courts until it has met the approval of many courts over time. Only then, through repeated scrutiny and trial, has the rule earned the assumption that it will prevent more error than it will cause if consistently applied.⁶⁰ Indeed, there is evidence that courts often apply a test of this kind.⁶¹

Interestingly, a condition of judicial acceptance and use over time alters the provenance of the precedent rule. The author is no longer the court that first announced the rule but the series of courts that later adopted it. This should not, however, present a serious problem for the rule model. As long as the rule issues from an authoritative source, and its meaning is uniformly understood, it can function as a serious precedent rule.

More problematic for any “judicial acceptance” test for precedent rules is its inherent and inexorable indeterminacy. How many and which courts must accept the rule? Must they accept it in identical canonical form? What should primary actors do during the period after the rule is first announced but before it is “accepted”? These and other questions might be answered by “rulifying” this rule-plus-acceptance model. (“The rule must be accepted by three courts of parallel rank within the jurisdiction within ten years, etc., etc.”) In the end, however, the added complexity of a rule for acceptance might undermine the advantages that a rule model of precedent aims to secure. The model will then become much more elaborate than the simple rule model.

⁵⁹ See Emily Sherwin, “The Story of *Conley*: Precedent by Accident” in Kevin M. Clermont, ed., *Civil Procedure Stories* (Foundation Press, 2004).

⁶⁰ See Edmund Burke, “Reflections on the Revolution in France and on the Proceedings in Certain Societies in London Relative to that Event” (1790), reprinted in Edmund Burke, *Selected Writings and Speeches* (Peter J. Stanlis, ed.) (Regnery Gateway, 1963), 424, 470 (referring to the common law as “the wisdom of the ages”).

⁶¹ Gerald Postema suggests that acceptance and repeated use by courts was understood to be the dominant criterion for precedential authority in the jurisprudence of classical common law. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 Oxford University Commonwealth Law Journal at 13, 17, 24–5.

C. Decision Making in the Absence of a Precedent Rule

The rule model of precedent requires courts to follow precedent rules, but it says nothing about how courts should proceed in cases that are not covered by the terms of any rule. The simplest default position is that courts should return to ATC moral reasoning in the absence of precedent rules. A possible alternative, consistent with common judicial practice, is for courts to reason by analogy, seeking out prior cases that appear similar and reaching parallel results.⁶²

As a matter of logic, we question whether this option exists.⁶³ Similarities between cases are meaningless in themselves: The fact that two plaintiffs have red hair, for example, does not mean that both should win if one does. There must be a principle, or “analogy-warranting rule,” which picks out similarities that are relevant to outcome.⁶⁴ If the analogy is supported by a rule implicit in the prior opinion, then what appears to be analogical reasoning is really an application of the rule model of precedent, broadly understood to recognize implicit rules. If no such implicit rule is available, the best explanation of analogical reasoning is that the later court has “abducted” a principle from an array of prior cases, which identifies similarities between those cases and the case before the court.⁶⁵ This process of abduction may or may not be a plausible form of reasoning, but assuming it is, reasoning by analogy is now an instance of the coherence model of precedent and suffers from the defects of that model. Specifically, a retrospective principle drawn from an imperfect set of decisional data incorporates the errors of past decisions but lacks the settlement value of a rule. As we have argued, a principle of this kind should not be treated as authoritative.

Thus, insofar as analogical reasoning differs from identification of implicit precedent rules intended by precedent courts to operate as rules, we reject it as a source of precedential constraint. Nevertheless, there may be potential benefits

⁶² On analogical reasoning, see the contributions of Melvin Eisenberg and Gerald Postema in this volume; Burton, *An Introduction to Law and Legal Reasoning*, 27–41; Levi, *An Introduction to Legal Reasoning*, 1–19; Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, 1996), 62–100; Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 *Harvard Law Review* 925, 925–9, 962–3 (1996). For a skeptical view, see Larry Alexander, *Bad Beginnings*, 145 *University of Pennsylvania Law Review* 57, 80–6 (1996). For a more sympathetic analysis, see Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 *University of Chicago Law Review* 1179 (1999).

⁶³ See Richard A. Posner, *The Problems of Jurisprudence* (Harvard University Press, 1990), 86–98 (describing analogical reasoning as “an unstable class of disparate reasoning methods”); Schauer, *Playing by the Rules*, 183–7 (describing analogical reasoning as a form of deduction from rules).

⁶⁴ See Brewer, *Exemplary Reasoning*, 109 *Harvard Law Review* at 962. But cf. Moore, “Precedent, Induction, and Ethical Generalization” in Goldstein, *Precedent in Law*, 188–9 (questioning whether it is logically possible to extract a rule from a decision rendered on particular facts).

⁶⁵ See Brewer, *Exemplary Reasoning*, 109 *Harvard Law Review* at 962.

to analogical reasoning as a professional custom among lawyers and judges. Ideally, a court engaged in ATC moral reasoning will test potential decisional principles against real and imagined examples of their application.⁶⁶ Courts, however, have limited time for reflection. The practice of studying past cases in search of relevant similarities at least ensures that they are exposed to a variety of fact patterns to which their own hypotheses might apply, as well as to various lines of reasoning pursued by prior courts. For this reason, courts may make fewer errors in the absence of rules if they believe they are able to, and even obliged to, reason by analogy from past cases.⁶⁷

D. Overruling Precedent Rules

The rule model of precedent requires courts to follow qualified precedent rules without deliberating about whether the results they prescribe are correct, all things considered. Courts may not second-guess the outcomes of rules, nor may they “distinguish” rules that appear to produce the wrong result in a particular case. When precedent rules are justified *as rules* – that is, when following the rules in all cases will produce fewer total errors than unconstrained deliberation – then erroneous results in particular cases are simply a by-product of the rules’ generality, which cannot be avoided without losing the benefits of rules.

However, some rules are not justified as rules: Following them in all cases will not yield a net benefit over ATC moral reasoning, either because the rules were wrongly conceived, or because changed circumstances have made them obsolete. The most persuasive objections to the rule model of precedent are based on its failure to offer an escape from rules of this kind: An accumulation of unjustified rules undermines the claim that serious precedent rules will minimize the overall level of error. Therefore, the rule model must be qualified by a power to overrule.

The most direct approach to overruling would entail judicial assessment of the justification of each rule: Before applying the rule to a particular case, the court would ask whether it prevents more error overall than it causes by prescribing erroneous outcomes. This type of assessment, however, presents the court with a difficult, if not impossible, task. It must evaluate the overall justifiability of the rule, but it must also refrain from evaluating the outcome the rule prescribes for the case now before it. Although the court’s two functions – overall assessment of rules and application of rules – are logically distinct, a court engaged with the facts of a particular case may find them practically inseparable.

⁶⁶ This process of reasoning is captured by Rawls’s term “reflective equilibrium.” See John Rawls, *A Theory of Justice* (Harvard University Press, 1971), 46–53.

⁶⁷ For a more detailed version of this argument, see Sherwin, *A Defense of Analogical Reasoning in Law*.

Alternatively, courts might adopt, or a legislature might prescribe, a rule for overruling. This strategy, however, is doomed to fail. A rule settles moral controversy by substituting a simple prescription for moral deliberation. The question of when to follow rules cannot be simplified in this way. A determinate rule for overruling (“Overrule all precedents more than ten years old”) is capable of guiding courts, but its own justification may come into question, requiring an appeal to a higher-level rule. At some point in the regress, moral judgment is unavoidable if the problem is to be solved. In contrast, an indeterminate standard (“Overrule precedent rules when the reasons for overruling them reach a strength of X”) cannot function as a rule. Moral judgment is once again required.

The best solution, in our view, is to adopt a presumption in favor of precedent rules: Courts may overrule, but only when the rule is obviously and seriously unjustified.⁶⁸ The standard of obvious and serious lack of justification, for this purpose, is a standard of overall rule assessment, not a standard of rule application. Courts must apply rules to the cases before them, even if they are convinced that the result is an error. Only if a court is almost certain that the rule, if consistently followed, will produce far more error than it prevents may the court refuse to follow the rule.

This standard is not ideal. The presumption in favor of rules prevents courts from overruling some rules that should be overruled. Meanwhile, the unavoidable vagueness of the presumption means that courts will differ in their assessment of when rules are obviously unjustified, and the potential for variable judicial behavior undermines to some extent the settlement value of the rules themselves. Finally, even when limited by a presumption in favor of rules, an overruling power that asks courts to assess the justifiability of rules but not to evaluate the results they prescribe for the case at hand requires mental gymnastics from judges. Nevertheless, this rough solution seems preferable to any other: Some power to overrule is necessary to escape rigidity and unnecessary error. Meanwhile, rules for overruling are unworkable, and unconstrained rule assessment is inconsistent with the habit of obedience to rules on which the rule model of precedent depends.

⁶⁸ Psychologically, this approach would entail a “peek” at the justification of the rule, of the kind Frederick Schauer recommends in his discussion of “presumptive positivism.” See Schauer, *Playing by the Rules*, 196–7. Although we do not think presumptive positivism is successful as a solution of the general dilemma of rules, it seems the best available solution to the question when a rule should be jettisoned altogether. See Alexander and Sherwin, *The Rule of Rules*, 68–73.

Some Types of Law

JOHN GARDNER

Laws can be classified in various ways. They can be classified according to the legal systems to which they belong (English, Roman, international, etc.) or according to the subject matter that they regulate (contracts, property, torts, etc.) or according to their normative type (duty-imposing, permission-granting, etc.). In this chapter I will be concerned with the classification of laws – and hence of law as a genre – in only one dimension. It is the classification of laws according to how they are made. This is already a philosophically partisan and some may say question-begging enterprise. Some laws, say some people, are not made at all. They are not artefacts. They have no agent(s) who serve as their originator or creator or author. By demystifying some of the intriguing ways in which laws are made, I hope to remove some of the appeal of this view.

In my first three sections I consider, respectively, legislated law, customary law, and case law. In the fourth section I discuss common law: How does it fit in? In the final section I conclude that all the types of law discussed here are types of positive law. There is, I suggest, no other type of law but positive law.

I. Legislated Law

In a way (to be explained at the end of this chapter), legislated law is paradigmatic law. So it is not surprising that some writers simply equate law making with legislating. For example, Ronald Dworkin reads the claim that judges sometimes make law as the claim that judges are part-time legislators. He therefore treats criticisms of the latter claim as biting no less against the former.¹ Here Dworkin takes his cue from John Austin, whose “command theory” of

I am grateful to Timothy Endicott and Douglas Edlin for their helpful comments and criticisms.

¹ He treats criticisms of retroactive legislation as criticisms of retroactive law making more generally; and he treats criticisms of unelected legislatures as criticisms of unelected law makers more generally. See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), 84–6.

law attempted to explain all law making on the legislative model.² As H.L.A. Hart demonstrated, however, Austin's account is seriously impoverished as a general account of law making.³ Some nonlegislative modes of law making that we will be discussing below (in sections 2 and 3) cannot be squeezed into Austin's account without considerable artifice.

Indeed, even as an account of *legislative* law making, Austin's account is distorted. A command always purports to impose a requirement to act; but legislation, as Hart pointed out, often purports to confer a power or grant a permission instead.⁴ Austin's attempt to squeeze such nonmandatory legislative acts into the logic of commands is an embarrassment to his thinking.⁵ Yet his "command theory" is in some other ways a decent first stab at a general account of the nature of legislation, for commands do share three important features with legislative acts. First, a command, like a legislative act, is the act of a single agent. Second, a commander, like a legislator, acts with the intention of effecting one or more normative change(s) by that very act of commanding or legislating. Third, a command, like a legislative act, is a way of making normative changes expressly – that is, by expressing or attempting to express the normative changes that one intends thereby to make.

Some people remember Hart as having argued that commands should be *contrasted* with legislative acts in respect of the second (and hence the third) of these features. Did Hart not criticize Austin's "command theory" precisely for losing sight of law's normativity? Did he not object to Austin's representing the legislator as "the gunman situation writ large"? Yes, he did.⁶ But he never denied that all commands are express attempts to impose a requirement, and in that respect to effect a normative change. He merely showed by his discussion of the gunman situation that commands need not be attempts to impose *obligations* – that is, *categorical* requirements.⁷ In this respect commands differ even from those legislative acts to which they are most similar, namely legislative acts creating mandatory legal norms, which are all by their nature categorical.⁸

² John Austin, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble, ed.) (Cambridge University Press, 1995), 35–6.

³ H. L. A. Hart, *The Concept of Law* (2nd ed.) (Oxford University Press, 1994), 43–9.

⁴ Hart, *The Concept of Law*, 27–33.

⁵ Hart, *The Concept of Law*, 33–5.

⁶ Hart, *The Concept of Law*, 7.

⁷ Hart, *The Concept of Law*, 82. A categorical requirement is one that applies irrespective of the prevailing personal goals of the person to whom it applies. As Hart puts it, "the conduct required by [rules of obligation] may . . . conflict with what the person who owes the [obligation] may wish to do." Hart, *The Concept of Law*, 87. The commands of the gunman, in Hart's example, make an implicit appeal to a prevailing personal goal of the person commanded, viz. the goal of staying alive.

⁸ Another way to put the point, which Hart avoids but which chimes with his remarks at 112–13: The law claims to bind its subjects morally, whereas many commands speak only to the prudence of the commanded. For more discussion of law's moral claim, see my "Law's Aim in *Law's Empire*" in Scott Hershovitz, ed., *Exploring Law's Empire* (Oxford University Press, 2006).

Yet this thesis allows (and indeed presupposes) that commands and legislative acts are similar in other salient respects. They are alike enough to be worth contrasting. I just mentioned the three most important features in respect of which they are alike. Commands and legislative acts are norm-changing acts that are alike in respect of their agency, their intentionality, and their expressness.

In what follows I shall say no more about these features as features of commands. I will explore them only as features of legislative acts. They turn out to be the three features that give most help in distinguishing legislative law making from other kinds of law making. Let me consider them in reverse order.

Legislated law is expressly made. Legislated law includes law contained in written constitutional documents as well as that contained in everyday statutes, regulations, and bylaws. It also includes law contained in proclamations, edicts, directives, orders-in-council, and so on. In some legal systems it may also include treaty law. Its first hallmark is that it is expressly made. Under some conditions, I suppose, legislation might conceivably be expressed in gestures or pictures. But typically legislative law is articulated law. It is expressed in words. Here, for the sake of simplicity, I will talk as if all legislation is articulate legislation, but what I am about to say could readily be adapted to cover instances of inarticulate legislation as well.

Articulate legislation (hereafter simply “legislation”) is articulated by the legislator in the form of a legislative text. The text may be written or oral and may be made up of declarative or imperative sentences or both. One understands legislated law by understanding the legislative text that creates it. Of course, there is a great deal of variation between different legal systems when we come to the question of *how* one is to understand the legislative text. Different legal systems may have dramatically different canons of legislative interpretation. Some may require or permit a more literal approach, others a more “purposive” approach, to construing the legislative text. Some may require or permit more atomic interpretation of words or sentences or paragraphs in the legislative text; others may require or permit greater attention to the wider textual context in which the words or sentences or paragraphs appear. Some may require or permit the interpreter to seek interpretative help in some or all of the debates that led up to the legislation’s enactment, whereas others may regard this as cheating. All of this concerns the proper *mode* of interpretation for legislated law. None of it should distract us from the fact that, where legislated law is concerned, the legislative text is always the primary *object* of interpretation.⁹ Whatever changes to the law one ultimately finds contained in the legislation,

⁹ I am simplifying. Legislation is a speech-act. As J. L. Austin says of speech-acts more generally, “[t]he total speech-act in the total speech-situation is the *only actual* phenomenon which, in the last resort, we are engaged in elucidating.” J. L. Austin, *How to Do Things with Words* (Oxford University Press, 1962), 148. So the ultimate object of interpretation is strictly speaking the act of legislating. My point is that the act of legislating is the act of enacting a text, meaning that the interpretation of the text has primacy in the interpretation of the legislation.

and however one sets about finding them, one presents them as contained in the legislation only by presenting them as entailed by an interpretation of the legislative text (or some part of it, such as a phrase or sentence or paragraph).

What one is looking for in interpreting a legislative text are the changes that it makes to the law, which are normative changes. The changes may include the introduction of new legal norms or the modification or elimination of old ones. To simplify, I will restrict my attention to the legislative creation of new norms. But what I will say also applies, *mutatis mutandis*, to the modification and elimination of existing legal norms.

So (to simplify): What one is looking for in interpreting a legislative text are the legal norms that it creates. A common mistake is to confuse a legislated norm with its formulation. Thus a lawyer may refer to “the words of the rule.”¹⁰ This cannot be taken literally. Rules do not have words. What she really means is the wording of the legislative provision that creates the rule. It is tempting to think of this as the wording of the rule because legislated norms, unlike other legal norms, are canonically formulated. In the event that other purported formulations of the norm would give it inconsistent content (i.e., would point to its being a different norm), the formulation in the legislation prevails in settling what norm it is. Yet still the legislative formulation should not be identified with the norm that it formulates, for two rival norms can be identically formulated. This is why the legislative formulation often needs to be interpreted to find out which of two rival norms it formulates. Conversely, two rival formulations can be formulations of one and the same norm. Otherwise one could not interpret part of a legislative text by reformulating it consistently with itself, as lawyers often do.

Another way to put this is to say that the legislative text is not the *only* possible object of legislative interpretation. The law created by the statute – the statute’s legal effect – is itself a second possible object of interpretation. The two come apart most obviously when intervening interpreters (e.g., judges in the highest court) use their legal power to interpret the legislative text in a way that binds successor interpreters.¹¹ Then the legal norms created by the statute are rendered more determinate (and in that respect are changed) by an exercise of interpretative authority, even though the formulation in the legislation remains the same. When this is true, a successor interpreter interprets the legal effect

¹⁰ See, e.g., *Three Rivers District Council v. Governor and Company of The Bank of England* (No. 3), [2001] UKHL 16 at [154], [2003] 2 AC 1, 280 (Lord Hobhouse).

¹¹ Cf. *In re Spectrum Plus Ltd.*, [2005] UKHL 41, [2005] 2 AC 680, where Lord Nicholls suggests that when courts are interpreting legislation they cannot be bound by the intervening interpretations of other courts. Why not? According to Lord Nicholls: (a) earlier court decisions bind only inasmuch as they effect a change in the law, but (b) interpretation leaves its object unchanged. The error in (b) is exposed in Joseph Raz’s “Interpretation without Retrieval” in Andrei Marmor, ed., *Law and Interpretation: Essays in Legal Philosophy* (Oxford University Press, 1995).

of the statute by interpreting the legislative text in the light of the cases that interpret the legislative text, cases that may themselves sometimes call for interpretation. We will discuss the creation and interpretation of case law in section 3. For present purposes, the only point that matters is this: Even where interpretation of the law in the statute requires interpretation of intervening case law, the legislative text remains the primary object of interpretation in the sense indicated earlier. Whatever legal norm one ultimately finds in the legislation, one still presents it as a norm found in the legislation only by presenting it as entailed by an interpretation of the legislative text, albeit now an interpretation of the text shaped by other interpreters' intervening interpretations of the same text. If the text drops out, so that the cases start to be treated as *independent* authorities for the legal norms they left behind, then those legal norms are no longer legislated legal norms. Then we are dealing with pure case law.¹²

Legislated law is intentionally made. Just as a promise is made with the intention of creating obligations by the very act of promise making, so legislation is enacted with the intention of changing the law by the very act of enacting it. Witness the “prayer” at the start of every (United Kingdom) Act of Parliament:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows . . .

This prayer removes one possible ambiguity that would otherwise afflict many of the ensuing legislative texts read literally. Declarative sentences in legislative texts (e.g., “Any person who libels the prime minister commits an offence”) are often capable of being read literally as reports of legal norms that (according to the text's author) already exist. On that reading any legal change effected by the Act would have to be regarded as an accidental legal change, a side effect of the legislature's attempt to state the law as it is.¹³ Thanks to the prayer, this reading of the Act is ruled out. “Any person who libels the prime minister commits an offence” means “It is *hereby made* an offence for any person to libel the prime minister.” The Act – as the prayer makes clear – is

¹² Gerald Postema puts the same point thus: “Some laws [are] valid in virtue of having been explicitly made by an authorised lawmaker; other laws [are] valid in virtue of incorporation into the common law. The class to which a given law [is] assigned [is] not determined solely by the way it came into being, but by its present mode of validity.” Gerald J. Postema, “Philosophy of the Common Law” in Jules Coleman and Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002), 598. Postema attributes the point to Matthew Hale.

¹³ Occasionally legislatures do include a provision in which “for the avoidance of doubt” they attempt to state or otherwise to preserve the law as it is apart from that provision. See, e.g., the U.K.'s Mental Capacity Act 2005, § 62: “For the avoidance of doubt, it is hereby declared that nothing in this Act is to be taken to affect the law relating to murder or manslaughter or the operation of section 2 of the Suicide Act 1961 (c. 60) (assisting suicide).”

intended as an act of norm creation on the part of the legislator, in this case Parliament (or the queen in Parliament, as the institution is more accurately known).

In the literature on legislation, there is much discussion of whether an institution (for example, Parliament) is capable of having intentions.¹⁴ Doubts about whether Parliament is capable of having intentions often stem from the well-known difficulty of using parliamentary intentions as a guide to the interpretation of statutory texts. When courts say that they are interpreting statutes according to “the intention of Parliament,” this is widely accepted to be an empty courtesy. Parliament usually had no intentions concerning the meaning, application, use, or effect of the statute in question, because the members of Parliament who debated the statute and voted on it – even those who supported it and voted in favor of it – invariably had diverse and conflicting intentions concerning its meaning, application, use, and effect. Indeed, some members of Parliament possibly had no intentions at all concerning any of these matters (they were just lobby fodder who voted when they were told to by their political masters). All of this is true and important. One could design a constitution for Parliament that would determine whose intentions on matters such as the meaning, application, use, and effect of a statute are to be regarded as constituting Parliament’s intentions on these matters, in the event of conflicting intentions among ordinary members of Parliament. There has been a halting move in that direction in recent English law.¹⁵ But for the most part there are no such rules, and hence Parliament has no such intentions.

So Parliament often has no intention to make the particular changes in the law that it ends up making when it legislates. What does not follow is that, when it legislates, Parliament has no intention to change the law. Worries about the diverse and conflicting intentions of individual parliamentarians do not apply to this more humble intention. Barring the occasional misfire (e.g., an accidental stumble through the voting lobby by a drunken parliamentarian), all of those who participate in Parliament’s changing of the law intend to participate in it. Even those who vote against a certain piece of legislation have the intention to participate in changing the law, should they end up on the losing side in the vote. More precisely, they intend that the law be changed if that is Parliament’s intention, where what counts as Parliament’s intention depends in turn on the actions and intentions of at least some members of Parliament.¹⁶ So (in a way that will be further explained below) the law-changing intentions of individual

¹⁴ Notable doubters: Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986), 336; Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999), 43.

¹⁵ *Pepper (Inspector of Taxes) v. Hart*, [1993] AC 593 was the move; the halting started in *R. v. Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd.*, [2001] 2 AC 349.

¹⁶ This is sometimes called a “conditional” intention, suggesting that somehow it is not quite a complete intention. But there is nothing incomplete about it. See John Gardner and Heike Jung, *Making Sense of Mens Rea: Antony Duff’s Account*, 11 *Oxford Journal of Legal Studies* 559, 567–8 (1991).

members of Parliament both constitute and refer to the law-changing intention of Parliament itself, Parliament being the institution that does the legislating.

Some people deny that institutions (such as Parliament) can be agents. They insist on reading apparent references to institutional agency (e.g., to Acts of Parliament) reductively, as elliptical references to the agency of the individual human beings who go to make up the institution. On this view it is not the legislative institution but rather its membership that does the legislating. We will engage with this thought in a moment. At this point we are tackling a cross-cutting question: Whoever does the legislating, does he or she or it intend to change the law in the process? The answer is clearly yes. An agent acts intentionally inasmuch as it does what it does for (what it takes to be) reasons. Those who legislate, whether they are human beings or institutions, must do so for (what they take to be) reasons for and against changing the law. If they did not, there would be no sense in having legislative debates, in which supposed reasons for and against changing the law are presented, weighed, and challenged. Indeed, there would be no sense in having wider public debates about legislative policy, nor the general elections in which these debates are brought to a head. Such debates make sense only on the footing that whoever it is that legislates will, in legislating, respond to at least some supposed reasons for and against changing the law. These debates make sense, in other words, only on the footing that legislation intentionally effects legal change, exactly as the prayer in U.K. Acts of Parliament would have us believe it does.

Legislation is the act of one agent. The preceding remarks already foreshadow what comes next. Legislation is always the act of one agent. The agent may be a human being (e.g., Big Brother) or an institution (e.g., Parliament). The actions of an institution like Parliament depend on, but are not reducible to, the actions of those human beings who go to make it up. Thus an institution with no human beings in it (with no human members and no institutional members that in turn meet this condition) cannot act. Yet when an institution does act through its members, its acts are distinct from those of its members. Members of Parliament argue their points, table amendments, and cast votes. These are things that Parliament as an institution cannot do. On the other hand it is Parliament, not its membership, that legislates. Analogously, the members of an orchestra play their instruments, watch the conductor, and follow the score. But only the orchestra – concertedly – plays the symphony.

What turns a mere collection of human beings (musicians, politicians) into a concerted agent (an orchestra, a legislature), the actions of which depend on, but are not reducible to, the actions of those human beings who go to make it up (its members, officials)? We can distinguish natural concerted agency from artificial concerted agency. Natural concerted agency is the same as what I have elsewhere called “teamwork.”¹⁷ In teamwork, each team member adapts her

¹⁷ John Gardner, *Reasons for Teamwork*, 8 Legal Theory 495 (2002).

intentions to the actions and intentions of the others so as to avoid frustrating one another's intentions. But that is not all. Each team member also adds an extra intention, that of contributing to the work of the team as a whole. She intends not only that she (and each of the others) should make their complementary efforts, but that this should also be part of a team effort. So her own intention makes an essential reference to the intention of the team. When it does so, it also helps to constitute the intention of the team. The team is then a further agent distinct from the human beings who go to make it up. It too does things and tries to do things and intends to do things – things that are distinct from, albeit dependent on, the things that its individual members do and try to do and intend to do. In the orchestra, for example, each player intends to play her part. But she also intends that, by all together playing their parts, the orchestra as a whole should play the symphony. That feature turns orchestral performance into teamwork. There may be only 105 human beings but at least¹⁸ 106 agents are involved in the performance. The 106th is the orchestra itself.

In natural concerted agency (teamwork) there may be norms that assign and regulate leadership and other special roles in the team (e.g., the role of the orchestra's conductor, its lead violinist, and so on). But in natural concerted agency there is no need for nor any possibility of a norm that assigns to anyone the role of *representing* the concerted agent. Nobody in the orchestra, for example, is its representative for the purpose of playing a symphony. The orchestra itself plays the symphony. At the same time somebody in the orchestra (or more likely in its management) is probably its representative for the purpose of booking concerts, hiring musicians, and so on. Such actions of the orchestra belong to the realm of *artificial* concerted agency.

Artificial concerted agency is, strictly speaking, a form of vicarious agency, the possibility of which depends on the existence of norms that empower one agent (e.g., a chief executive) to act in the name of another (e.g., a charitable organization). Such norms are needed when a concerted agent needs to (be able to) perform an action (e.g., enter into a contract or make a promise) that can be performed only by the further action of a single human being (e.g., by signing a name or shaking a hand). Such single-human-being actions cannot even in principle be performed by teamwork, and so they require representation. But norms to empower representation can also be used more widely to enable teams to perform actions that could in principle be performed by teamwork, but only with excessive cost or difficulty. They can also be used to confer a capacity for concerted agency on a bunch of interacting human beings (e.g., a nation, a local community, a government) whose interactions do not naturally qualify

¹⁸ I say "at least" because maybe there are some intermediate agents between the individual human beings and the whole orchestra. Possibly the string section is agent 107, the wind section is agent 108, and so on.

as teamwork because one or both of the intentions required for teamwork are absent.

Modern legislative institutions typically work by a combination of natural and artificial concerted agency. There are officials (and committees and separate legislative chambers and so on) whose actions are treated for certain purposes as actions of the legislature. They may have powers to act in the name of the legislature for some parts of the legislative process. But the institution's ordinary members also work on legislation as a team, in natural concerted agency. Barring the occasional drunken accident, the members intend to participate in the legislative process whenever they do so. They not only intend to vote and to adjust their voting to the votes or intended votes of other members. They also intend that their votes contribute to legislative action or inaction on the part of the institution itself. The constitution of the institution must of course determine which human beings count as members of the institution for this purpose, and how their votes will be counted, and so on. So the agency of the institution still depends on norms determining who may be part of the team and what roles they will have. Nevertheless, there is genuine teamwork. The relevant members act as a team in debating and approving legislation. When they do so, within the rules, it is the institution itself that legislates.

Can there be legislation without any concerted action, either natural or artificial? Of course there can, for in the Great Dictatorship, the Great Dictator legislates all by himself. The live question is only whether there can be legislation *involving multiple human beings* without concerted action, either natural or artificial, on the part of those multiple human beings. The answer is that there cannot. To interpret what one has before one as legislation, one must interpret it as an attempt by someone to effect normative changes expressly. One therefore needs to think of the text (or the word or sentence or paragraph, etc.) as having an author who was trying to convey a meaning. One therefore needs to think of its creation as either an individual action or a concerted action. There must have been an action of legislating and hence an agent (an individual agent or a concerted agent) who legislated. Most anxieties about this conclusion come of the thought that the concerted agency in question is a legal fiction. There are two responses to this thought. First, the concerted agency is not completely fictitious; the members of legislative institutions do typically perform much of their work as a team, and in that respect they are to be regarded as natural concerted agents akin to orchestras and football teams. Second, there is nothing wrong with a legal fiction of concerted agency, if by that phrase we mean simply that the law attributes actions by one agent (an official) to another agent (an institution) under norms that make the former a representative of, and hence an agent who acts on behalf of, the latter, for there are artificial concerted agents, and many of them are creatures of law. It does not follow from the fact that they are creatures of law that they do not exist or that they are not agents. On the contrary, it follows from the fact that they can perform

actions with legal effect, such as legislating, that they do exist and that they are agents.

II. Customary Law

Legislated law may of course be influenced by custom. It may also refer to custom, giving it legal recognition, for example by saying that the statutory standard to be applied in judging the conduct of an electrician is the standard of conduct that is customary in the electrical trade. This is not customary law. The customary norm in this case is not, even after its legal recognition, a legal norm. It is merely a legally recognized norm. It is the same situation as that which obtains when English law refers to some norm of French law in settling some family law problem arising out of a marriage conducted in France. This does not make the norm of French law into a norm of English law. Likewise, a legislative reference to a customary norm does not make the norm into a norm of customary law.¹⁹ Customary law, rather, is made up of customary norms that are *ipso facto* legally binding, that are part of the law without further ado.

Bentham distinguished two different kinds of custom that may constitute customary law: custom *in pays* (the custom of a population of legal subjects) and custom *in foro* (the custom of a population of legal officials).²⁰ In the complex legal systems that law school professors are used to dealing with, little customary law is made *in pays*. A possible exception is in international law. In international law, states constitute the population of legal subjects. Arguably some customs that hold in the relations between states are *ipso facto* part of international law. But the example is made problematic by doubts about international law itself. It is an anomalous legal system in which the distinction between officials and subjects is blurred. Arguably this even makes it a borderline case of a legal system.²¹ In what follows I will therefore be thinking mainly about municipal legal systems and hence about custom *in foro*: about customary law that is constituted as law by the customs of legal officials such as judges, police officers, and bailiffs. Again I will consider the distinguishing features of this kind of law under three headings, to facilitate a contrast with legislated law. First, customary law is not made by articulating (or otherwise expressing) its content. Second, customary law is not intentionally made. Third, customary law is made not by one agent but by many.

Customary law is not expressly made. Customary law is, of course, communicated. It is disseminated by example, and dissemination by example is a kind of communication. However, customary law, unlike legislated law, is not *made*

¹⁹ Joseph Raz, *Practical Reason and Norms* (Hutchinson, 1975), 152–4.

²⁰ Jeremy Bentham, *A Comment on the Commentaries and a Fragment on Government* (J. H. Burns and H. L. A. Hart, eds.) (Athlone Press, 1977), 182–4.

²¹ As Hart argues in *The Concept of Law*, ch. 10.

by any acts of communicating it. It is made by acts of conforming to it. It is created and changed not by what people say is to be done but by what they actually do. So no formulation of a customary legal norm is ever canonical. Once a legal norm acquires a canonical formulation, any other way of settling its content answers to the canonical formulation in the event of conflicting interpretations of the norm. But where a customary legal norm is concerned, any other way of settling its content (including by formulating it) answers to the behavior of the relevant population.

Customary law is created and changed not by what people say is to be done but by what they do. What kind of doing is required? Is it enough that a population's behavior converges? Is it enough that mowing the lawn is what people around here do every Sunday morning? Or must the population's behavior also converge *around a norm*, such that they are attempting to follow the norm when they act? Must it be the case that mowing the lawn is what people around here regard as the done thing on a Sunday morning, and that is why they do it? The first case is that of a social habit. The second case is that of a social norm. Here is a simple argument for thinking that customary law must be constituted by a social norm rather than a social habit: If a custom is to form part of the law, it must be normative in the eyes of the law. It must constitute a legal norm. So there must be someone who, on behalf of the law, regards the custom as normative. That someone could, of course, be someone other than the population whose custom it is. It could be, for example, a legislature or a court. But in that case it is the fact that the legislature or the court regards the custom as normative which gives it whatever legal effect it has. This is not customary law. Rather, it is custom that is legally recognized in legislation or case law. This leaves as a case of genuine customary law only the case in which the someone who regards the custom as normative, on behalf of the law, is the very same population whose custom it is. Therefore convergent behavior across a population is capable of constituting customary law only if the convergence takes place under a social norm. A mere social habit does not suffice.

H.L.A. Hart argued that every legal system must have at least one norm of customary law, which he called a rule of recognition. A rule of recognition is a norm that identifies some person or institution as an ultimate (i.e., nondelegated) maker of law.²² Why must every legal system have such a norm? Hart's argument proceeded from his criticisms of Austin. As well as claiming that all laws are commands, Austin claimed that every legal system has an ultimate legislator (or commander), whom Austin labeled its "sovereign." The identification of the sovereign, said Austin, is not a legal matter. There is no law on the subject. For if I make law under a law identifying me as a legislator, there must be someone above me in the system who in turn makes that higher law identifying me as a

²² Hart, *The Concept of Law*, 94–5.

legislator. In which case I am not after all the sovereign: I am not an ultimate, but only a delegated, legislator. It follows that the sovereign cannot be identified by a legal norm.²³ Rather, the sovereign must be identified by conforming behavior. The sovereign is the person or institution to whose commands people around here habitually conform. Sovereignty is efficacy.²⁴

Hart agreed with Austin in holding that a legal system is in force only if it is efficacious.²⁵ The efficacy condition is met so long as legal subjects largely abide by the laws, but irrespective of whether they know the legal basis on which they do so (i.e., what makes these laws into laws). Yet, argued Hart, there must be such a legal basis. Within each legal system the identification of the ultimate legislator is itself a legal question. It is a question of constitutional law. How can this be? Austin was right to think that a legislature cannot possibly be identified as an ultimate legislator by further legislation so identifying it. His mistake, thought Hart, was merely to conclude that a legislature therefore cannot be identified as an ultimate legislature by *law* so identifying it. This holds true only if, as Austin thought, all law is legislated. But in fact it is not. There is also the possibility of customary law. Customary law is capable of identifying a legislator (as it were) from below, not from above. The law identifying the ultimate legislature – the rule of recognition – is constituted by other people's conformity to the legislation.²⁶ The legislature's power to make law is not delegated by these other people. For these people are *ex hypothesi* not legislators and so they have no legislative powers to delegate. In fact they do not delegate any powers at all. Rather, by their custom they create a legal duty, a legal duty to treat the ultimate legislator's word as law, a law that in turn may create legal powers for others.²⁷

Whose custom? Which custom? It is tempting simply to follow Austin and say: the social habit of the wider population of legal subjects. But Hart notices that this answer is not adequate to the task at hand. The task at hand is not only to point to the conforming patterns of behavior but also to explain how it is that they constitute legal norms. What makes the conforming behavior normative from the legal point of view? For the law to have a point of view there must be people who represent the law in the identification of norms. These people are legal officials. To be more exact, they are law-applying officials. They not only do what, according to the ultimate legislature, is to be done. They also treat adherence to the word of the ultimate legislature as the done thing. They regard the norms created by the ultimate legislature as norms for them to apply, because there is a norm under which, as officials, they have a duty to apply norms created

²³ Austin, *The Province of Jurisprudence Determined*, 212, 239.

²⁴ John Austin, *Lectures on Jurisprudence* (5th ed.) (J. Murray, 1885), 220–1.

²⁵ Hart, *The Concept of Law*, 103–4.

²⁶ Hart, *The Concept of Law*, 101–2.

²⁷ This aspect of the rule of recognition was clarified by Raz in *Practical Reason and Norms*, 146.

by the ultimate legislature. So conformity to the word of the ultimate legislature is a social rule among the officials, not just a social habit. For Hart, this social rule is what constitutes the rule of recognition of the legal system. The rule of recognition is therefore an example of customary law *in foro*.²⁸

One may quibble with various aspects of Hart's account. Some of his arguments are incomplete. But one major insight cannot be denied. Especially but not only where a legal system has no canonical constitutional text, it is common to say that ultimate constitutional questions are questions of practice (or *realpolitik*), not questions of law. Hart exposed this as a false contrast.²⁹ That a question is one of practice does not mean that it is not one of law, for some law is made by what people do, not by what they say. Much constitutional law is made in this way. What Hart calls "rules of change" and "rules of adjudication" are often but not always found in customary, as opposed to legislated, constitutional law.³⁰ But if Hart is right, every legal system has at least one constitutional law – a rule of recognition – that is customary rather than legislated. The rule of recognition belongs to the unwritten part of the constitution even in legal systems with so-called "written constitutions." A rule of recognition may of course come to be articulated by some legal officials, maybe even in a constitutional document. But the articulation is never canonical. Inasmuch as the norm as articulated departs from the norm as practiced by law-applying officials, the practice of the officials is what fixes the content of the rule of recognition. Do as we do, not as we say.

Customary law is not intentionally made. Unlike legislated law, customary law is not intentionally made. Of course the actions by which it is made are almost always intentional actions. The officials who create Hart's rule of recognition, for example, clearly intend to follow (what they take to be) a rule when they do so. What they do not intend to do is to *create* or *change* a rule in the process. Their law making is usually an accidental by-product of their intended law applying. For example, by treating an Act of Parliament as valid law – by raising no questions about its validity and interpreting its contents as law – judges contribute to making it the case that Acts of Parliament in general are valid law. They contribute to making the rule of recognition what it is. But that is not what they usually intend to do. What they usually intend to do is to apply a legal norm that, so far as they are concerned, exists quite apart from their action of applying it, because it is a norm found in an Act of Parliament. And in a way they are right. The norm is in the Act and it is part of the law of the land according to a rule of recognition of the legal system, which is a customary norm that no single judge is in a position to change. Moreover, because any change in this rule depends on the usually unforeseeable actions

²⁸ Hart, *The Concept of Law*, 116–17.

²⁹ Hart, *The Concept of Law*, 111–12.

³⁰ Hart, *The Concept of Law*, 95–9.

of many other law-applying officials, usually no single judge is in a position to *intend* to change it either.³¹ And yet as a law-applying official each single judge is part of the official population whose social rule constitutes the legal rule, and as part of this population he can contribute to changing the rule. It follows that a single judge can readily be an accidental participant, but only rarely an intentional participant, in a change of customary law.

In the scenario just sketched, the intentional application of one legal norm (a legislated norm) potentially makes an accidental contribution to change in another legal norm (a customary norm). In a different scenario, the legal norm that the judge accidentally helps to change is the very same customary legal norm that she intends to apply without changing it. This possibility helps us to see a way forward with an old and tiresome debate. We all know that the law can be changed by the actions of judges. That is what gives the law a history that can be studied by studying judicial decisions. Yet judges almost always talk as if all they are doing is applying the law unchanged. Should we regard this self-presentation as a mere pretense, a spin that judges put on their arguments to shore up their legitimacy? Sometimes, no doubt, we should. But sometimes we should regard it more generously as an innocent slip on the part of the judge. Such slips are particularly easy to make where customary law is concerned, thanks to the indeterminacy of customary norms. Of course, all legal norms have their indeterminacies. In the case of legislated norms, these typically include indeterminacies of language and indeterminacies of intention.³² But customary law is subject to another kind of indeterminacy which comes precisely of the fact that it is neither articulately nor intentionally made. When a new situation emerges that is close to one that is already regulated by a customary norm, what determines whether it is or is not regulated by the norm? In the case of customary norms (or, more generally, norms that are made by their use) nothing determines this except what people do next by way of supposed application of the norm. The norm is indeterminate in its application until actually applied. This makes for a characteristic kind of slip in the application of customary law. Overlooking tiny differences between the present situation and past situations that were admittedly regulated by the norm, it is easy to jump to the conclusion that the norm already regulates the present situation when in reality it is still indeterminate in respect to its regulation or nonregulation of the present situation. This represents a tiny mistake of law. But such mistakes can contribute gradually to changes in the custom, and hence to changes in the law. Over time the customary law comes into line with its own hitherto mistaken applications. Officials who intended only to apply the norm without changing it contributed accidentally to this normative change. This, it strikes me, is the usual way in which customary law *in foro* changes.

³¹ See R. Antony Duff, *Intention, Agency, and Criminal Liability: Philosophy of Action and the Criminal Law* (Blackwell, 1990), 56.

³² Hart, *The Concept of Law*, 127–9.

Customary law is not made by one agent. Again the next step has been anticipated. The making of customary law requires multiple actions by multiple agents. There must be widespread convergence of actions before we have a custom, and hence before we have customary law. What is not required is any kind of joint agency, any kind of teamwork on the model of an orchestra or Parliament. Joint agency is possible only when the participants in it are aware of one another's actions, and intend their actions to contribute to the same project as the actions of others. In the case of parliament this is how the intention to make law takes shape: The various members and officials of Parliament do not merely happen to go through the lobbies together. They do it in the awareness that others are doing it and intending their actions to contribute, together with the actions of others, to the making of law. Custom is very different. Participants in customs are, as we have seen, sometimes acting with the intention to follow a social rule (to do the done thing). But their intentions here are not joint intentions. They are merely intentions in common. They do not require mutual awareness or an intention to participate in a common project. And sometimes – when a custom is constituted by social habit – not even an intention in common is needed. It is enough that behavior converges, never mind the reasons.

A great deal of ink has been spilt on the question of what kind of interaction among law-applying officials is required to constitute Hart's famous rule of recognition. Hart originally took the minimal view described above. Law-applying officials need only regard it as the done thing for law-applying officials like themselves to treat the word of the ultimate legislature (and other authorities of inherent jurisdiction) as law. But under pressure from Ronald Dworkin, Hart later allowed that the rule of recognition is perhaps not just a social rule but a *conventional* social rule.³³ This opened the way to elaborate discussions of Hart's "conventionalism" about law. In particular, Hart's thinking came to be linked with a body of philosophical literature on convention that gave a highly technical sense to the term, in which conventional rules are only those social rules that serve coordinating social functions.³⁴ From here it was a surprisingly short step to the idea that the officials whose actions add up to constitute the rule of recognition of each legal system are engaging in something close to teamwork, intentionally coordinating with one another in the manner of an orchestra playing the symphony of law.³⁵ It seems to me that all of this extra baggage is not only misguided and unnecessary but contrary

³³ Hart, *The Concept of Law*, 267.

³⁴ Jules Coleman, *Negative and Positive Positivism*, 11 *Journal of Legal Studies* 139 (1982); Gerald Postema, *Coordination and Convention at the Foundations of Law*, 11 *Journal of Legal Studies* 185 (1982); Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press, 2001), 10–24. Marmor makes an important change to the relevant explanation of convention.

³⁵ Jules Coleman, *The Practice of Principle* (Oxford University Press, 2001), 98; Scott Shapiro, *Laws, Plans, and Practical Reason*, 8 *Legal Theory* 387 (2002); Christopher Kutz, *The Judicial Community*, 11 *Philosophical Issues* 442 (2001). Each of these writers understands "intentionally co-ordinating" slightly differently.

to the tenor of Hart's original proposal.³⁶ It brings the rule of recognition ever closer to the model of legislated law, a creation of many working as one. But Hart's whole point was that a different kind of law is needed before legislated law is possible. It is needed to create legal institutions of the kind that can pass undelegated legislation. This customary law is not the work of many working as one. It is the work of many acting as many. They create new law collectively as an accidental by-product of their individual efforts to follow the law as it is. Each intends in her own case to follow the rule of recognition, not to change it.

III. Case Law

It is essential to the nature of law that all legal systems have law-applying officials who make legal rulings. A legal ruling is a legally binding decision on the application of a legal rule to what lawyers call a "case": to a situation-token rather than a situation-type. In the case of *Barnewall v. Adolphus*, for example, there may be a legal ruling that Barnewall now owes Adolphus \$50. An official who has the power to make such a legal ruling – typically a judge – also has the power to change people's legal positions. He has the power to change Barnewall's legal position and Adolphus's legal position and the legal position of the bailiffs who execute the debt and the legal position of newspapers that report the decision and so on. But he does not necessarily have the power to change the law itself in the process. He has the power to change the law itself in the process only if, by making the legal ruling, he can also change the legal rule under which he makes it, thereby affecting its application in cases other than the one before him. We have already seen how a judge might contribute to doing this by contributing to a change in official custom. But in some legal systems some judges also have the power to change legal rules *solo* by making legal rulings. This is not customary law because no convergence of official behavior around the new rule is required to make it part of the law. This type of law is known as case law.

Typically judges set about adding to case law by applying existing law – that is, by applying law that exists apart from their act of applying it. Typically they argue that a certain ruling, even if not required by existing law, would be consistent with existing law and a sound development of existing law. They proceed in this way because they have a professional moral duty (usually crystallized in their oath of office) to keep faith with whatever existing law there is on any

³⁶ Other doubters: Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries" in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998), 161–2; Leslie Green, *Positivism and Conventionalism*, 12 *Canadian Journal of Law and Jurisprudence* 35 (1999); Julie Dickson, *Is the Rule of Recognition Really a Conventional Rule?*, forthcoming.

subject on which they make a ruling. But this professional moral duty need not and often does not circumscribe the legal power of judges to make law. In many legal systems, judges with the ability to add to case law do so even if they do so *per incuriam*: even if they ignore and contravene existing law in doing so. When that happens, other judges may have extra powers to overrule the errant decision when it comes to light in later cases. But this confirms, rather than challenges, the claim that the law was changed by the errant decision in the meantime. If the law was not changed, overruling would not be necessary. Such judicial law making without the support of existing law is in one respect akin to legislating. It is an activity of making law *de novo*. Yet it is not legislating, for legislators do not make law *de novo* by applying law. *Qua* legislators they make legal rules but no legal rulings, whereas judges, even when they make legal rulings without the support of existing law, always make law by applying it. Whenever they make case law, they make law by the act of applying the very same law that they thereby make.

So case law is neither legislated law nor customary law. It has some features in common with each. To see the similarities and differences more clearly, I will ask the same questions about case law that I asked about legislated law and customary law. Is case law expressly made? Is it intentionally made? Is it made by one agent or by many?

Case law is not expressly made. Case law is a kind of law made by judges. It is to be found in the judgments that judges give when they decide the cases brought before them. These judgments take the form of texts, which (like legislated law) may be either written or oral, which may be expressed in declarative or (rarely) imperative sentences, and which call for interpretation. These latter features may encourage the thought that case law is a kind of legislated law. But a major difference lies in *how* the judgment of a judge creates whatever new law it creates. Case law, unlike legislated law, is not made by being articulated. It is made by being used in argument. In this respect case law, in spite of its delivery in textual form, has more in common with customary law than it does with legislated law. Recall that customary law is made by (social) rule following. Using a rule in argument is also a kind of rule following, even though the rule in question need not be a social one.

An argument is made up of at least two premises and a conclusion. For simplicity, let's imagine a very simple two-premise legal argument that could be made by a judge.

Rule: Any person who calls another person a liar has a duty to pay \$50 to that other person.

Fact: Barnewall (a person) called Adolphus (another person) a liar.

Ruling: Thus, Barnewall has a duty to pay \$50 to Adolphus.

Of course, arguments made by judges are often much more complicated than this. The facts of the case are often much more arcane. There are often subsidiary

arguments that bear on the interpretation of the rule, or the interpretation of the facts. And the main argument often runs through a series of interim conclusions that are then used as premises in the next stage of the argument. But none of this makes any difference to the point about case law that concerns us now. So let's focus on the simple, pared-down case of *Barnewall v. Adolphus*.

To do her judicial work in the case of *Barnewall v. Adolphus*, the judge must express at least one legal norm: She must express her ruling. Until she has ruled, she has not judged, and until she has expressed her ruling, she has not ruled.³⁷ Judging in the sense of making a ruling on a case may be thought of as akin to a legislative act, because the ruling is not only expressed but expressed with the intention of binding the parties legally by that very act of expressing it. But unlike legislation, the ruling by itself does not make new law. The law is made up of legal rules, legal norms that apply to more than one case. Legal rulings are legal norms that apply only to the case in which the ruling is made and hence do not form part of the law.

So if the judge in *Barnewall v. Adolphus* does make new law, that law lies not in her ruling but in the rule she uses to make it. Yet she might not attempt to formulate her rule. She might only state the facts and the ruling, leaving the later interpreter of the case to work out the rule that she is using. The rule she is using is one that, combined with the facts of the case, suffices to yield the ruling. So in interpreting the case one begins by working back to the rule from the facts and the ruling. This may be what prompts some people to say that judges decide cases, and hence make case law, by reasoning "on the facts" rather than by the use of rules.³⁸ The contrast here is false, and the suggestion, taken literally, is baffling. No number of facts can ever yield any legal ruling except in combination with a legal rule that renders those facts legally pertinent. What makes it seem otherwise is merely that, where case law is concerned, the rule being used belongs to what David Lyons aptly calls implicit (or implied) law as opposed to explicit (or express) law.³⁹ The rule is implicit because it is made by being used in the case, rather than by being expressed. It is the rule as used rather than the rule as stated.

I said that the rule for which a case stands is one that, combined with the facts of the case, suffices to yield the ruling. But surely, in any given case, there are

³⁷ As with legislation, this expression is typically in words but it could be by symbol or gesture (e.g., a thumbs-down).

³⁸ See, e.g., Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 University of Chicago Law Review 41, 66–7 (1994). The view is echoed in Jerry Postema's contribution to this volume.

³⁹ David Lyons, "Moral Aspects of Legal Theory" in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (Rowman and Allenheld, 1983), 58. The expression "implicit law" was first used by Lon Fuller in *Anatomy of the Law* (Praeger, 1968), where it was contrasted with "made law." Because implication is one way of making law, Fuller's contrast is unfortunate. Lyons improves upon it by contrasting "implicit law" with "explicit law" but strangely still tends to talk as if those who believe that law is made can recognize only explicit law.

many possible rules that meet this specification? Surely the rule could always be rendered more general and still combine with the facts to yield the ruling? Perhaps the rule in *Barnewall v. Adolphus* is not the narrow

Rule 1: Any person who calls another person a liar has a duty to pay \$50 to that other person.

Perhaps it is the broader

Rule 2: Any person who calls another person an insulting name has a duty to pay \$50 to that other person.

Or perhaps it is the even broader

Rule 3: Any person who calls another person a name has a duty to pay \$50 to that other person.

Any of these three rules (and countless others) can be combined with the fact as found in *Barnewall v. Adolphus* to yield the same ruling. So how do we know which of these many rules the case stands for? Which is the *ratio decidendi* of the case? Perhaps there is no answer, in which case we have some seriously indeterminate case law before us. It may be indeterminate which of these three rules (among countless other possibilities) is the rule in *Barnewall v. Adolphus*. The effect of the case on the law is then arguable, and the case could therefore be relied upon in later cases to support various rival arguments and hence incompatible rulings.

In practice, however, such legal indeterminacies tend to be mitigated in a number of ways. Let me mention four.

First, a legal system that makes extensive use of case law may have closure rules to help render its case law more determinate. There might, for example, be a rule of law according to which (subject to indications to the contrary in the judgment) the *ratio decidendi* of a case is the narrowest rule that suffices, in combination with the facts of the case, to yield the ruling in that case – in which case, all else being equal, rule 1 would beat rules 2 and 3 to qualify as the rule in *Barnewall v. Adolphus*.

Second, the rule that a case stands for must be consistent not only with the ruling in that case but also with the rulings in any other cases on which the judge relied in arriving at his ruling (for these rulings too form part of the argument in the case). In legal systems that depend heavily on case law for their development, often long lines of cases combine to lend increasing determinacy to the rule for which the last of them stands. This is the main way in which case law gradually crystallizes over time, sometimes referred to as its “organic” quality.

Third, the arguments presented by judges often include not only the application of a rule but also a rationale for the rule as applied. If so, this rationale also forms part of the *ratio decidendi* and constrains the range of possible interpretations of the rule in the case. The rule in the case must then be one capable

of being supported by its rationale, as well as one capable, in combination with the facts of the case, of yielding the ruling.

Finally, judges often do formulate the rule, or aspects of the rule, for which they regard their case as standing. In such a case, subject to the previous three points, the judicial formulation of the rule helps us to narrow down the range of possible rules for which the case stands. Of course, the rule so narrowed down must still suffice to yield the ruling in the case – and otherwise be compatible with the argument in the case – or else it is not the rule for which the case stands. In the terms I used before, the argument in the case is still the primary object of interpretation. Interpreting the formulation is merely a way of aiding the interpretation of the argument. This marks a key difference between case law and legislative law. Where legislative law is concerned, as we have seen, the legislative formulation is canonical. So long as one is applying the legislation, one may not abandon the legislative formulation as an object of interpretation, even if it cannot be reconciled with a certain ruling or a certain rationale. With case law the reverse is true: The rule that a case stands for is a rule that supports the ruling in the case, and it is supported by the rationale in the case, even if these cannot be reconciled with the judge's attempted formulation of the rule.

Case law may be intentionally made. Case law differs from customary law in that the act of making it may be intended to make law. But case law differs from statutory law in that the act of making it is not *necessarily* intended to make law. To put it simply: The act of making new case law may be either intentional or accidental. The judge may either mistake the rule he is applying for the existing rule of law and hence not intend to add anything to the law by applying it, or he may realize that the rule he is applying is a departure from the existing rule of law and hence intend to change the law by applying the rule he is applying. Which path the judge is taking is rarely apparent from the judge's own arguments. This is because, even when a judge is intentionally changing the law, he or she has a professional moral duty to do so on legal grounds – that is, by pointing to existing legal rules that, when soundly developed, would justify a departure from, and hence change in, the particular legal rule that is now under consideration. When she changes the law on legal grounds, the judge often is not sure, and does not need to be sure, whether what she is doing counts as changing the law. It often strikes the judge only as a matter of reconciling two apparently conflicting rules of law. It often does not matter to her whether these rules of law are only apparently conflicting (in which case neither of the rules need be changed in order to reconcile them) or whether they are really conflicting (in which case at least one of the rules needs to be changed in order to reconcile them).

In English law (and in many other legal systems of English descent), judges sometimes have the power to overrule previous judges on points of law, something that cannot be done (knowingly⁴⁰) without intending to change the law.

⁴⁰ So-called “implied overruling” – where the overruling court is unaware of the case it is countermanding – need not be intended to change the law.

But judges also often have the power to do something more modest, which is to *distinguish* cases decided by earlier judges. One distinguishes a case by narrowing the rule used in an earlier case so that it still yields the original ruling in that case (and is otherwise still consistent with the *ratio decidendi* of that case) but does not regulate the case now being decided, leaving the court in the present case free to rely on a different and apparently conflicting rule. There is no doubt that the judicial power to distinguish is a power to change the law.⁴¹ But is the law changed every time the power to distinguish is ostensibly exercised? Surely not. There are surely many cases in which the rule in a previous case already does not extend to the case at hand and so does not need to be narrowed to secure its non-application. The “distinguishing” of the case is then a precaution devoid of legal effect, or an explanation by the judge of why the case does not need to be distinguished. It is rare that judges need to know whether they are distinguishing a case (using their power to narrow the rule so as to disapply it) or merely “distinguishing” it in this inert way (pointing out that it is already narrow enough not to be applicable). So it is rare that judges need to form an intention to change the law when they are engaged in adding to the stock of case law by distinguishing earlier cases.⁴² Because a great deal of the stock of case law in England and in cognate jurisdictions is furnished by distinguishing, a great deal of case law is likely to have been unintentionally made.

Case law is made by one agent. Like legislators, the makers of case law may be human beings (individual judges) or institutions (courts made up of a number of judges). In some legal systems both individual judges and the courts they belong to are capable of contributing to the stock of case law. Individual judges have a certain authority when they deliver their own judgments. But when they agree with one another in such a way that their judgments add up to the judgment of the court, their authority is augmented and the rules they agree on become harder for later courts to disregard or overrule. To understand this, one needs to understand courts as having artificial personalities akin to those of legislatures. There are rules about how the actions of the members of the court come together to constitute actions of the court itself. It matters who is in the majority, and failing that who is in the plurality, and so forth. At the same time, many judges (unlike ordinary members of the legislature) have some legal powers as natural persons and can affect the content of the law by what they do and intend to do even when they are at odds with the decision of their court (for

⁴¹ For discussion, see A.W.B. Simpson, “The *Ratio Decidendi* of a Case and the Doctrine of Binding Precedent” in A. G. Guest, ed., *Oxford Essays in Jurisprudence* (Oxford University Press, 1961); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979), ch. 10; Frederick Schauer, *Precedent*, 39 *Stanford Law Review* 571 (1987).

⁴² Grant Lamond, *Do Precedents Create Rules?*, 11 *Legal Theory* 1, 13–14 (2005). Lamond contrasts distinguishing a case with interpreting its *ratio*. But one may do both at once: One may narrow the rule in a case on the ground that the rule in that case was wider than was needed to do justice to the rationale that was given for it in that very same case.

example, when they are dissenters in respect to the judgment of the court, or they are concurrers who arrive at the same ruling as the court but using different rules). One may be tempted to conclude from this that case law can be made by either many agents or by one. But in fact it is always made by one. The agent is either a single human being (a judge) or a single institution (a court populated by judges).

Of course, because the authority of case law may vary, it may be to one's legal advantage to have a lot of case law on one's side. When one cites a long line of cases dating back for centuries, it may seem as if one is really relying on customary law, not case law. But in three ways what one is relying on differs from customary law. First, the authority of the line of cases rests on an aggregation (quite a complex aggregation) of the authority of the courts and judges whose decisions are included in the line. With customary law, by contrast, there is no legal force to these individual decisions until they are aggregated. The second is that the cases need not include any real convergence on the law. Perhaps no two cases in the line apply exactly the same rule. They may instead tell a story of continuous legal change, with a series of acts of distinguishing that gradually and inexorably turn the law in one's favor. The third, implicit perhaps in the second, is that even to the extent that the cases in the line do converge, they need not include any simultaneous convergence. It is part of the nature of custom that there should be a measure of simultaneous convergence. Even 200 reputable nonconformists do not constitute a custom of nonconformity if there was never more than one nonconformist at a time, if there was at no time a social rule of nonconformity, whereas 200 reputable nonconformists on the judicial bench do constitute a huge weight of authority in case law even if they all engaged in their nonconformity at quite different times and merely passed the baton of their nonconformity along against a backdrop of completely countervailing custom. Case law, to put it simply, may readily conflict with customary law *in foro*.

The accompanying table summarizes the classification of types of law that we have encountered so far.

	Expressly made?	Intentionally made?	By what kind of agency?
<i>Legislated law</i>	Express	Intentional	Individual
<i>Customary law</i>	Not express	Unintentional	Multiple
<i>Case law</i>	Not express	Either	Individual

IV. Common Law

Common law is not another type of law to be added to the above table in addition to legislated law, customary law, and case law. the Common Law (with capital letters) is a legal tradition marked by a number of different and only contingently

related features. The tradition is polytypic: Most but not all of its distinguishing features are present in each legal system belonging to the tradition. Some of these features do not concern the way the law is made. So, for example, the following are characteristic features of Common Law legal systems:

1. Common Law legal systems employ a distinctive “adversarial” fact-finding process, of which trial by jury is the epitome.
2. Common Law legal systems embody a distinctive doctrine of the rule of law, according to which officials of the system are, with specific exceptions, subject to the same legal rules as non-officials.
3. Common Law legal systems make use of certain distinctive legal categories, such as trustee, consideration, and estoppel.

When referring to common law without capital letters, however, many lawyers working in the Common Law tradition are referring to only part of the law of their own systems. Often they are drawing a contrast with legislated law. Common law, one may glean, is law that comes into being in a different way from legislated law. But how does it come into being? Is it case law or is it customary law? The founding myths of the Common Law as a legal tradition tend to present it as a system of custom *in pays*.⁴³ It is law that rises up from the general population, as opposed to statute law, which descends upon the population from the king. This founding myth is in many ways ridiculous. The law in question was mostly the work of the king’s judges. But even if this were not the case in the twelfth century, it is surely the case now. The common law doctrines in use now are the creatures of judicial use. Yet this leaves open the question: What kind of judicial use? Is it judicial use in one case at a time, constituting case law? Or is it concurrent and convergent judicial use, constituting customary law *in foro*?

It seems to me that common law, as contrasted with legislated law, contains elements of both case law and customary law. In England, where we have an almost entirely unwritten constitution, there is probably more common law that is custom *in foro* than in some legal systems belonging to the Common Law tradition that have a canonical constitutional document. This is because in the English setting, not only the rule of recognition but also many other constitutional rules are made and sustained accidentally by the judicial custom of following them. When at long last these rules are explicitly challenged in court, there is often no previous case law on the point. No pertinent case has ever been argued before any court. And yet many judges and other officials have been quietly following the same rules over hundreds of years. So here we have judicial customary law, as opposed to case law, that is part of the common law of England.

⁴³ Postema, “Philosophy of the Common Law,” in *Oxford Handbook of Jurisprudence*, 590–2.

One nice example, in England at least, is the doctrine of *stare decisis*, which regulates the extent to which and the ways in which later courts may overrule earlier courts. In large measure this doctrine entered the common law of England as a kind of judicial custom. But notice that it is not a doctrine concerned with the development of customary law. It is a doctrine concerned with the development of case law. Indeed, comparative lawyers sometimes talk as if only legal systems with a doctrine of *stare decisis* can include case law. This is a mistake, for the decisions of earlier courts may add to the stock of case law even though there is no protection against these decisions' being superseded by the decisions of other courts. Where there is no such protection, it is tempting to say that there is no "binding" precedent, but only "persuasive" precedent. But this is strictly speaking incorrect. Courts may change the law on Tuesday even though other courts may change the law back again on Wednesday. When legislators do such things we do not deny that the legislated law made on Tuesday is binding, albeit only briefly. After all, if such legislated law were not binding there would be no need for it to be changed back again on Wednesday. Instead it could be disregarded. We should say exactly the same thing with case law. The decision of an earlier court must be binding in law for it to be necessary for a later court to overrule it. So a doctrine of *stare decisis* does not alter the power to make binding law. It only alters the power of later courts to change the binding law that was thereby made. It follows that one may have case law in a legal system without having a doctrine of *stare decisis*. On the other hand one may not have a doctrine of *stare decisis* without having case law.

In spite of that, the doctrine itself need not be created by case law. It could in principle be created by statute. More to the point, it could be created by judicial custom. That is the position, it seems to me, in England. So it would be a mistake to think of common law as case law alone. Common law is probably better thought of as case law combined with judicial customary law concerning the reception and use of case law. In both respects it can usefully be contrasted with legislated law.

Yet the contrast with legislated law is also impure. When common law is contrasted with legislated law it is almost always contrasted with legislated law as developed by case law. Common law, we could say, includes only that part of case law which is not concerned with the interpretation of legislation. Of course, even in Common Law jurisdictions, a great deal of case law is concerned with the interpretation of legislation. The point is only that one could equally have a legal system with a great deal of case law but no common law. There would be no common law because all the case law would be case law concerning the interpretation of legislation. Legislation – including the legislation of the written constitution – would be regarded as the primary object of interpretation, with the interpretation of case law required only as part of the process of interpreting the legislation. What seems most special about Common Law jurisdictions is that they have a great deal of case law that is not

about the interpretation of legislation. It is only about the interpretation of other case law.

V. Positive Law

All three of the types of law I have discussed here are types of positive law. They are all made by somebody and we know that they count as law only when we know who made them. Legislated law is made by legislators. Case law is made by judges. Customary law is made by (official or non-official) populations. Case law and customary law – “nonlegislated law” for short – is sometimes represented as nonpositive law, simply because it is not made expressly or intentionally. Thanks to these features, it is easy to make it seem as if nonlegislated law is not really made at all. Ronald Dworkin, for example, relied on these features of case law in arguing that at least some of it exists without anyone’s ever having made it. The implicit law to be found in the cases exists, according to Dworkin, by virtue of the fact that it provides a sound moral justification for whatever explicit law there might be in those same (and other?) cases. So it can be made without any kind of engagement with it by anyone. It exists even before it is cited or used by anyone.⁴⁴ My discussion has suggested that this is a mistake. It is true that case law is implicit law in the sense that it is not made by being expressed. Nor is it always made intentionally. The rule in the case has to be worked out by examining the judge’s argument, to see what rule he implicitly, and maybe accidentally, relied upon. Nevertheless, the judge brings the rule into existence by relying on it. So implicit law, like explicit law, is still brought into existence by someone. It is still positive law, for there is no such thing as nonpositive law. No legal norms come into existence without being brought into existence by someone. It is merely that there are several ways of bringing them into existence.

As mentioned at the outset, Dworkin errs in thinking of all law makers as legislators. This leads him to think that any law which is not legislated does not have a law maker. The error is dramatic. Yet it is readily understandable, for there is a sense in which legislative law making is paradigmatic law making. How so? Several times in this chapter I have referred to the *authority* of legal officials. I have also referred to the authority of the law itself, for example the authority of case law. You may understand this to be no more than another way of referring to the positivity of law – that is, to the fact that all legal norms are made by someone. But my references to authority suggest a stronger thesis, for, while all exercises of authority are acts of changing the norms that apply to others, not all acts of changing the norms that apply to others are exercises of authority. To exercise authority is to change the norms applicable to others

⁴⁴ Dworkin, *Taking Rights Seriously*, 110–18.

by the very act of attempting to change them. It is a definitionally intentional action. So, of the types of law we have identified, only legislative law need be made by an exercise of authority. Case law may but need not be made by an exercise of authority. Customary law, meanwhile, is not made by an exercise of authority at all.

This need not, however, inhibit us from referring to customary law as authoritative. Nor does it stop lawyers from referring to cases as authorities even when the only law making they involve is accidental. The explanation is given by Raz:

[An analysis of law making as an exercise of authority] could in principle apply to a legislator and his acts of enactment. But not all law is enacted. Customary rules can be legally binding. Can they be authoritative despite the fact that they are not issued by authority? It is possible to talk directly of the authority of the law itself. A person's authority [is] explained by reference to his utterances: he has authority if his utterances are protected reasons for action, i.e. reasons for taking the action they indicate and for disregarding (certain) conflicting considerations. The law has authority if the existence of a law requiring a certain action is a protected reason for performing that action. . . .⁴⁵

Legislating is the paradigm of law making because it involves an exercise of authority: an attempt to change another's normative position by that very act of attempting to change it. Customary law, and accidentally made case law, is also authoritative, but only in a derivative sense. It is not made by an exercise of authority. But in respect of its normative force, it is treated as if it were. It is authoritative in reception albeit not in creation. One can understand what it means to receive something as authoritative only by understanding what it means to exercise authority. So, inasmuch as the authority of law is central to its nature, one naturally understands law by working out from legislative law to other types of law. One understands other types of law by grasping how they differ from legislative law.⁴⁶

Why should we think of the authority of law as central to its nature? Here is the answer suggested by Raz himself:

[To play] a mediating role between ultimate reasons and people's decisions and actions . . . the law must be, or at least be presented as being, an expression of the judgment of some people or of some institutions on the merits of the actions it requires. Hence, the identification of a rule as a rule of law consists in attributing it to the relevant person or institution as representing their decisions and expressing their judgments. Such attribution need not be on the ground that this is what the person or institution explicitly said. It may be based on an implication. But the attribution must establish that the view expressed in the alleged statement is the view of the relevant legal institution. Such attributions can only be based on factual considerations. Moral argument can establish

⁴⁵ Raz, *The Authority of Law*, 29.

⁴⁶ Cf. Waldron, *Law and Disagreement*, ch. 6, who unexpectedly sacrifices the paradigmatic status of legislative law by attempting to explain the nature of authority without any mention of intentionality.

what legal institutions should have said or should have held but not what they did say or hold.⁴⁷

On this view, it is the role that law plays in coordinating and otherwise assisting our rational agency which explains why law must be thought of as authoritative. And it is the need for law to be thought of as authoritative that explains why all law is positive law, why all law needs its law maker(s). I have not defended this line of thought here. I have limited myself to the more modest task of showing how customary law and case law, no less than legislative law, qualify as types of positive law in spite of distracting features that may lead one to think otherwise.

⁴⁷ Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (revised ed.) (Oxford University Press, 1994), 231.

COMMON LAW REASONING

The Principles of Legal Reasoning in the Common Law

MELVIN A. EISENBERG

The purpose of this chapter is to develop the principles that should, and largely do, govern legal reasoning in the common law.¹ By the common law, I mean judge-made law, and by judge-made law, I mean law made by the courts taken as a whole.

I. Four Foundational Ideas

I begin with four ideas that provide the foundation of the principles developed in this chapter: (1) courts should make law concerning private conduct in areas where the legislature has not acted, (2) the principles of legal reasoning turn on the interplay between doctrinal propositions and social propositions, (3) legal rules can be justified only by social propositions, (4) consistency in the common law depends on social propositions.

A. Courts Should Make Law

The first foundational idea is that courts should make law concerning private conduct in areas where the legislature has not acted. Like other complex institutions, common law courts serve several social functions, but two of these are paramount. The first concerns the resolution of private disputes. The second is the enrichment of the supply of legal rules to empower and govern private conduct. Our society has an enormous demand for legal rules that private actors can live, plan, and settle by. The legislature cannot adequately satisfy this demand. The capacity of a legislature to generate legal rules is limited. Moreover, much of that capacity must be allocated to the production of public-law rules and to matters such as budgets, taxation, governmental organization, and public administration. Furthermore, state legislatures are normally not staffed in a manner that enables them to perform comprehensively the function of establishing law

¹ For ease of exposition, in the balance of this chapter I will refer to legal reasoning in the common law simply as legal reasoning.

to empower and govern private conduct. Finally, in many areas the flexible form of a judge-made rule is preferable to the canonical form of a legislative rule.

Accordingly, it is socially desirable that the courts act to enrich the supply of legal rules that concern private conduct – not by taking on law making as a freestanding function, but by attaching much greater emphasis to the establishment of legal rules than would be necessary if the courts' sole function were the resolution of disputes.

An important corollary of the idea that it is socially desirable for judges to make law is that courts should utilize methods of legal reasoning that are easily replicable by the profession as a whole. If the methods of legal reasoning utilized by courts are easily replicable by the profession as a whole, then the profession normally can determine the law and give advice on that basis. If, however, the methods of legal reasoning utilized by courts are not easily replicable, then it will be difficult for the profession to determine the law. Such a state of affairs would vitiate the judicial lawmaking function.

B. Doctrinal and Social Propositions

The second foundational idea is that the principles of legal reasoning turn on the interplay between doctrinal propositions and social propositions.

By *doctrinal propositions*, I mean propositions that purport to state legal rules and are found in or can be derived from sources that are generally regarded by the legal profession as expressions of legal doctrine. One group of doctrinal sources consists of official texts that are regarded as binding on the deciding court, such as statutes and precedents of the deciding court's jurisdiction. A second group of doctrinal sources consists of official texts that are not binding on the deciding court, such as precedents in other jurisdictions and statutes that are applicable only by analogy. A third group consists of texts written by members of the profession, such as Restatements, treatises, and law reviews. Propositions that take the form of rules and are found in a given type of source are doctrinal if in the view of the legal profession it is proper to invoke propositions of that type as rules to decide cases.

By *social propositions*, I mean all propositions other than doctrinal propositions. The types of social propositions most salient to the common law are moral norms, policies, and empirical propositions (i.e., propositions that describe the way in which the world works, such as statements concerning individual behavior and institutional design; statements that describe aspects of the present world, such as trade usages; or statements that describe historical events, such as how a trade usage developed).

Not every social proposition can properly be taken into account by a court in making law. For reasons I have developed elsewhere,² normally in making

² Melvin Aron Eisenberg, *The Nature of the Common Law* (Harvard University Press, 1988), 14–42.

common law rules, the courts can properly take into account only (1) moral standards that claim to be rooted in aspirations for the community as a whole and that either can fairly be said to have substantial support in the community, can be derived from moral standards or policies that have such support, or appear as if they would have such support; (2) policies that claim to characterize states of affairs as good for the community as a whole and have comparable support; and (3) experiential propositions that are supported, or appear to be supported, by the weight of informed opinion. In the balance of this chapter, when I refer to social propositions I mean this universe of social propositions.³

A crucial difference between doctrinal propositions and social propositions is that doctrinal propositions are invoked by the legal profession *as* legal rules, while social propositions are invoked as *reasons for* legal rules. For example, there is a well-established rule that a simple donative promise (a promise to make a gift that has not been relied upon, is not based on a preexisting moral obligation, and is not in some special form, such as under seal) is unenforceable. If we want to show *that* a simple donative promise is unenforceable, we invoke doctrinal propositions. If we want to show *why* there should be a rule that simple donative promises are unenforceable, we invoke social propositions.

To illustrate, suppose a court in a given state is asked to decide whether reliance makes a donative promise enforceable. There is no case in the state on that precise issue, although old cases held that donative promises are unenforceable, but without having considered the possible effect of reliance. However, Section 90 of the *Restatement of Contracts* has adopted the rule that relied-upon donative promises are enforceable, and courts in many or most other states have adopted the rule embodied in Section 90. If the deciding court proposes to adopt that rule, it may publicly reason in one or both of two ways. First, the court may adduce the social propositions that underlie the rule embodied in Section 90 and the out-of-state cases, and then state that it agrees with those propositions and therefore adopts the rule. Second, the court may simply invoke the rule adopted in Section 90 and the out-of-state cases, and then apply that rule to decide the case at hand.

C. Legal Rules Can Be Justified Only by Social Propositions

The third foundational idea is as follows: There are two very different kinds of justification in legal reasoning. The first is justification for *following* legal rules. The second is justification *of* legal rules. A court may be justified in following a doctrinal rule on the ground that the rule can be identified as a legal rule – say

³ Some commentators argue that courts should employ some different universe of social propositions – such as the moral and policy propositions that the court believes are best, or that best cohere with the existing body of law – in establishing common law rules. For the most part, the principles developed in this chapter apply even if common law courts should properly employ the propositions in one of these alternative universes.

because the rule has been adopted by the legislature or by the highest court of the deciding court's jurisdiction. However, the fact that a rule can be identified as a legal rule does not justify the rule itself. For example, there is a rule that a bargain is consideration. The existence of the bargain rule justifies a court in following the rule and enforcing bargains. However, the existence of the rule cannot justify the rule. Only social propositions can justify the bargain rule.

D. Consistency in Legal Reasoning

The fourth foundational idea is that consistency in legal reasoning depends on social propositions, not formal logic.

Begin with the consistency of two precedents. Formal logic can tell us that, and only that, the different treatment of identical cases is inconsistent. However, no two cases *are* identical, and formal logic cannot determine what differences between cases justify different results. Therefore, if the only criterion of consistency were formal logic, the concept of consistency would have little or no meaning in making a determination whether two precedents are consistent. But consistency does have meaning in making that determination, and that meaning depends on social propositions. For purposes of legal reasoning, two precedents are consistent if they reach the same results on the same relevant facts, and inconsistent if they reach different results on the same relevant facts. What facts are relevant turns on social propositions. For example, as a matter of social propositions – and only as a matter of social propositions – it is often relevant in determining liability for causing an accident that the defendant was intoxicated, but seldom if ever relevant that the defendant was wearing a red hat. We could think of societies in which it would be relevant that a party to an accident was wearing a red hat. For example, it might conceivably be relevant in the Vatican. But under the social propositions of our society, it would not be relevant.

Next, consider the consistency of a rule and an exception to the rule. Whether a rule and an exception are consistent also depends on social propositions. A rule and an exception are consistent if, and only if, one of the following conditions is satisfied:

- (1) the social proposition, *SP1*, that supports the rule does not extend to the type of case covered by the exception,
- (2) the exception is justified by a social proposition, *SP2*, and there is good social reason, in the type of case at hand, to allow *SP2* either to trump *SP1* or to figure, along with *SP1*, in the creation of an exception that is a vector of both social propositions.

To illustrate, take the rule that bargains are enforceable. There are a number of exceptions to this rule. The exceptions are consistent with the rule only if the exceptions are based on social propositions. For example, one standard exception to the rule is that a bargain made by a minor is not enforceable against

the minor. This exception is consistent with the bargain rule because, and only because, the social propositions that support the bargain rule do not support the application of the rule to bargains with minors. One social proposition that supports the bargain rule is that actors are normally good judges of their own interests. Under other social propositions, however, this reason does not extend to minors. Therefore, the bargain rule should be and is made subject to an exception for minors. In contrast, suppose a court were to hold that a bargain made by a clergyman is not enforceable against the clergyman, even if the bargain is not religious in nature (that is, even if it does not concern issues of dogma, or the allocation of authority within a church, or the like). This exception would be inconsistent with the rule. That inconsistency, however, would not be because of formal logic but because social propositions would not support a clergyman exception for this purpose. It is easy to imagine social propositions that would support clergyman exceptions for other purposes or in other societies or times. In the Middle Ages, for example, clergymen could be prosecuted for a felony only in ecclesiastical courts, and therefore they were not subject to capital punishment. Even today, religious bargains made by clergymen might well be unenforceable. But social propositions in contemporary society would not support a clergyman exception for secular bargains. That is the reason, and the only reason, why such an exception would be inconsistent with the bargain rule.

A similar analysis normally applies to the consistency of two rules, as opposed to a rule and an exception. Two rules will be consistent in a strong sense if, and only if, one of the following conditions is satisfied:

- (1) the two rules are supported by the same social propositions,
- (2) each rule is supported by different social propositions and the social propositions are not in conflict, either because the social propositions that support one rule have no bearing on the other, or because they do have a bearing but would not lead to a different rule,
- (3) the two rules are supported by different social propositions that are in conflict in certain cases, in the sense that, taken alone, the different social propositions would lead to different rules to govern those cases. However, each social proposition has a range of applicability in which it does not conflict with the other, and there is good reason why, in the cases in which the social propositions conflict, either one social proposition should be subordinated to the other, or one or both rules should reflect the conflicting social propositions in different ways.

It is necessary, however, to draw a distinction here between a strong and a weak meaning of consistency between legal rules. Two legal rules are consistent in a strong sense only if one of the three conditions is satisfied. Even if none of those conditions is satisfied, however, two legal rules may be said to be consistent in a weak sense if one rule falls within a deep doctrinal domain that is traditionally taken to justify differentiations that are not justified by social propositions. Examples include the special treatment that is often afforded to

transactions in the domains of the real estate and maritime worlds. These two deep doctrinal domains may render different treatment of two socially comparable transactions consistent in a weak sense on the ground that one transaction involves personal property and one involves real property, or one transaction involves navigable waters and the other does not. However, the number of such domains is very limited. Domains of this sort tend to dissolve over time, because they provide only an impoverished justification for different treatment of socially comparable transactions. For example, a well-known trend in modern law is the gradual dissolution of the distinction between real estate leases and other contracts.

When the four foundational ideas are combined, they seem to give rise to a basic dilemma in legal reasoning. On the one hand, we want the common law to consist of the rules that are the best possible rules on the basis of social propositions. I will call this goal the *ideal of social congruence*. On the other hand, we want the law to be reliable. To achieve reliability, and to make judicially adopted rules *legal* rules, weight must be given to doctrine. I will call this goal the *ideal of doctrinal stability*. However, when a doctrinal rule is invoked, typically it is invoked not on the ground it is the best possible rule, but because of the manner in which it was adopted – for example, in a binding precedent. Indeed, the fact that a rule is doctrinal can be significant only if the rule is not the best possible rule. If the rule were the best possible rule, the fact that the rule was also doctrinal would bring nothing to the table. But if rules are to be taken into account even when they are not the best possible rules, the ideal of doctrinal stability and the ideal of social congruence are in tension. How can this tension be reconciled?

II. The Basic Principle of Legal Reasoning

To answer this question, I begin by constructing a hierarchy of rules under the ideal of social congruence. First are rules that are fully congruent with social propositions. These are the best possible rules under that ideal. Next are rules that are not fully congruent with social propositions but are substantially congruent with such propositions. These are reasonably good rules, although not the best possible rules. Last are rules that are substantially incongruent with applicable social propositions. These are not even reasonably good rules; they are poor rules.

Given this differentiation, the principle that should be used to resolve the tension between the ideals of social congruence and doctrinal stability, and to guide legal reasoning in the common law, is as follows: A doctrinal rule should be consistently applied and extended if it is the best possible rule because it is fully congruent with social propositions. A doctrinal rule should also be consistently applied and extended, even if it is not the best possible rule, if it is a reasonably good rule because it is substantially congruent with social

propositions. However, a doctrinal rule should not be consistently applied and extended if it is a poor rule because it is not even substantially congruent with social propositions.

I call this principle the *basic principle of legal reasoning*. This principle is descriptive of legal reasoning in the common law, although it is typically implicit rather than explicitly. The principle is also normatively desirable, because it appropriately reconciles the tension between the ideal of doctrinal stability and the ideal of social congruence by giving appropriate weight to each ideal.

First, the ideal of doctrinal stability is and should be given weight, because predictability has social value. This weight is reflected in the branch of the principle that the courts should not decline to follow a rule as long as it is a reasonably good rule, even if it is not the best possible rule. Small differences between the best possible rule and a reasonably good rule are likely to be highly debatable, difficult to perceive, or both. Therefore, if the courts failed to follow a doctrinal rule just because the rule was modestly less desirable than a competing alternative, it would be difficult to put reliance on doctrine. To put this differently, at least over the short term, the value of making *minor* improvements in legal rules is normally outweighed by the value of doctrinal stability.

The ideal of social congruence should be and is given weight, because the courts should not consistently apply and extend a common law rule that is not even a reasonably good rule. The value of *major* substantive improvements in legal rules normally outweighs the value of doctrinal stability.

III. Modes of Legal Reasoning

In this part, I will elaborate the basic principle of legal reasoning, together with the four foundational ideas, to provide normative and positive accounts of several specific modes of legal reasoning. Legal reasoning falls into a number of specific modes, such as reasoning from precedent, distinguishing, reasoning by analogy, overruling, reasoning from principle, and reasoning by the use of hypotheticals. In this chapter, I will examine only reasoning from precedent, distinguishing, and reasoning by analogy. These are the workhorses of legal reasoning. Furthermore, these modes are intimately connected: none can be understood in isolation from the others.

A. Reasoning from Precedent

I first consider reasoning from precedent. The *end point* of reasoning from precedent involves the application, by the deciding court, of the rule for which a precedent stands. Although rule application may involve various kinds of difficulties. I will focus here not on the end point of reasoning from precedent but on the *starting point* of such reasoning. The starting point of reasoning from

precedent is the establishment, by the deciding court, of the rule for which a precedent stands.⁴

Here we arrive at a crucial dichotomy, because there are two entirely different and indeed opposed approaches by which a deciding court may establish the rule for which a precedent stands. I will call these the adopted-rule approach and the result-based approach.

Under the adopted-rule approach, the rule for which a precedent stands is the rule the precedent explicitly adopted (i.e., explicitly stated to be the rule), provided the rule was relevant to the issues raised by the dispute before the court. Under the result-based approach, the rule for which a precedent stands is whatever rule that was strictly necessary, on the facts of the decision, to reach the result of the decision. A common corollary of this approach is that the rule deemed necessary to reach the result in a precedent is the narrowest possible rule that would justify the result. To put this differently, under the adopted-rule approach what counts is what the precedent court said, whereas under the result-based approach what counts is what the precedent court did.

The result-based approach accords with the way courts sometimes talk about precedents. As a full description of judicial practice, however, the result-based approach comes up very short. Deciding courts almost invariably base their determination of the rule that a precedent stands for on the rule that the precedent court explicitly adopted, not on the rule that was strictly necessary to reach the result on the fact. Indeed, courts that reason from precedent more often than not simply quote, paraphrase, or summarize the rules explicitly adopted in the precedent. And in basing their decisions on the rule adopted by a precedent court, deciding courts seldom analyze whether that rule had an ambit that was broader than was necessary for the decision. Anyone who reads cases will observe this phenomenon.

There is a good reason why courts should and normally do use the adopted-rule approach rather than the result-based approach to establish the rule of a precedent. The adopted-rule approach usually (although not always) enables the courts and the profession to establish the rule of a precedent with relative ease. In contrast, widespread use of the result-based approach would render the law highly uncertain, because normally many different rules can be constructed to explain the result of a precedent, and there is no mechanical way in which to privilege one of those rules over the others.

This problem is well illustrated by the famous British case *Donoghue v. Stevenson*.⁵ The plaintiff and a friend were together in a café, and the friend purchased a bottle of ginger beer for the plaintiff. The bottle was opaque. After the plaintiff drank part of the ginger beer, she discovered a decomposed snail in the bottle. She suffered shock and severe gastroenteritis and sued the manufacturer.

⁴ Many rules are established by a series of precedents rather than a single precedent. However, for ease of exposition, in this chapter I will usually treat a rule established by precedent as if it were established in a single precedent.

⁵ *Donoghue v. Stevenson*, [1932] AC 562.

The House of Lords held in her favor, three to two. Lord Atkin stated that “a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care.”⁶

Before *Donoghue*, it was a well-established rule of law that the manufacturer of a product was liable only to its immediate buyers for injuries caused by its negligence in producing the product. It is clear that *Donoghue* abandoned that rule, because the House of Lords held that the manufacturer was liable to the plaintiff, who was not the product’s immediate buyer. Under a result-based approach, however, it would be far from clear what rule the *Donoghue* case stands for, because as Julius Stone pointed out,⁷ under such an approach the facts in *Donoghue*, and therefore the rule necessary to justify the result, could be characterized at vastly different levels of generality. For example, the agent of harm in that case could be characterized as a thing, a food product, or a food product in an opaque container. The defendant could be characterized as a manufacturer, a manufacturer of nationally distributed goods, or a food manufacturer. The injury could be characterized as a physical injury, an emotional injury, or simply an injury. Under a result-based approach, therefore, *Donoghue* could stand for almost numberless rules constructed from permutations of the various facts at various levels of generality – for example, for the rule that if a manufacturer of nationally distributed goods that are intended for human consumption produces the goods in a negligent manner, it is liable for resulting physical injury; or for the rule that if a food manufacturer is negligent, it is liable for any resulting injury if it packaged the food in such a way that the defect was concealed.

The descriptive power of the adopted-rule approach is much greater than that of the result-based approach. In the great majority of cases, a deciding court simply applies the rule explicitly adopted in a precedent, without worrying about whether the precedent court could have adopted one or more other rules. But despite its predominance, the adopted-rule approach does not describe all judicial practice. Not infrequently, courts *do* use the result-based approach to reformulate the rule that was explicitly adopted by the precedent court. In some cases, a court employs a result-based approach on a relatively modest level, to distinguish a precedent away. In other cases, including some of our most important cases, a court employs a result-based approach on a grander scale, to overturn the rule that a precedent explicitly states, while purporting to follow the precedent – a use of the result-based approach that I will refer to as *transformation*.

⁶ *Donoghue*, [1932] AC at 599.

⁷ Julius Stone, *The Ratio of the Ratio Decidendi*, 22 *Modern Law Review* 597 (1959). See also A.W.B. Simpson, *The Ratio Decidendi of a Case*, 20 *Modern Law Review* 413 (1957); A.W.B. Simpson, *The Ratio Decidendi of a Case*, 21 *Modern Law Review* 155 (1958); A.W.B. Simpson, *The Ratio Decidendi of a Case*, 22 *Modern Law Review* 453 (1959).

Judge Cardozo's famous opinion in *MacPherson v. Buick Motor Co.*⁸ provides a classic illustration of the way in which a precedent can be made to stand for more than one rule under the result-based approach and therefore can be completely transformed to stand for a rule much different from the rule explicitly adopted in the precedent.

From an early time, the established rule in New York, like the established rule in England prior to *Donoghue*, was that a manufacturer was liable only to its immediate buyers for injury caused by its negligence in producing a product. In *Thomas v. Winchester*,⁹ decided in 1852, the established rule was affirmed, but reformulated, because an exception to the rule was created. The defendant in that case had negligently labeled a jar of belladonna, a poison, as dandelion, a medicine. The plaintiff bought the jar, thinking it was dandelion, drank its contents, and became seriously ill. The court first held that a manufacturer is normally liable in negligence only to its immediate buyer: "If A. build a wagon and sell it to B., who sells it to C., and C. hires it to D., who in consequence of the gross negligence of A. in building the wagon is overturned and injured, D. cannot recover damages against A., the builder. A's obligation to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life."¹⁰ Nevertheless, the court in *Thomas v. Winchester* imposed liability on the manufacturer, on the ground that a manufacturer is liable to persons other than its immediate buyer if its negligence put human life in imminent danger.

After the decision in *Thomas v. Winchester*, the New York cases all purported to follow the rule that a manufacturer who negligently produced a defective product was liable only to its immediate buyer unless the product was of a kind that is "imminently" or "inherently" dangerous, like poison. For example, in *Loop v. Litchfield*,¹¹ decided in 1870, the defendant had negligently constructed the flywheel of a circular saw. After the circular saw had been leased out by the original buyer, it flew apart and fatally injured the lessee. The plaintiffs alleged that the circular saw, like the poison in *Thomas v. Winchester*, was a dangerous instrument. The court rejected this argument and held that the manufacturer was not liable to the lessee. In *Losee v. Clute*,¹² decided in 1873, the defendant had negligently constructed a steam boiler that exploded and injured property of the plaintiff, who was not the defendant's immediate buyer. Again the court held that the manufacturer was not liable. In contrast, in *Devlin v. Smith*,¹³ decided in

⁸ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

⁹ *Thomas v. Winchester*, 6 N.Y. 397 (1852).

¹⁰ *Thomas*, 6 N.Y. at 408.

¹¹ *Loop v. Litchfield*, 42 N.Y. 351 (1870).

¹² *Losee v. Clute*, 51 N.Y. 494 (1873).

¹³ *Devlin v. Smith*, 89 N.Y. 470 (1882).

1882, the defendant had negligently constructed a painters' scaffolding, which then collapsed and caused the death of a worker. The court reiterated the rule that "The liability of the builder or manufacturer for [defects caused by negligence] is, in general, only to the person with whom he contracted." It nevertheless held the defendant liable on the ground that the defect rendered the scaffolding imminently dangerous. Similarly, in *Statler v. George A. Ray Manufacturing Co.*,¹⁴ decided in 1909, the defendant had negligently constructed a restaurant-size coffee urn, which exploded and severely scalded the plaintiff, who had purchased the urn from a jobber. The court held the defendant liable on the ground that the urn was "inherently dangerous" and the defendant's negligence made it "imminently dangerous."

MacPherson was decided in 1916. The case grew out of injuries suffered by MacPherson as a result of the sudden collapse of a new Buick that he had purchased from a dealer. One of the car's wheels had been made of defective wood, and the car had collapsed because the spokes of the wheel had crumbled into fragments. MacPherson sued Buick. MacPherson won a jury verdict, and Buick appealed. Cardozo affirmed the judgment for the plaintiff on the basis of the following rule:

We hold . . . that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. *If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.* . . . If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.¹⁵

This formulation adopted the cloak of the previous rule, insofar as it made the manufacturer's liability turn on whether the product was "a thing of danger." However, the formulation completely changed the substance of the old rule. Under the formulation in *MacPherson* the issue became not whether a product is of a type that is inherently or imminently dangerous, but whether a product is dangerous if negligently made – and any product can be dangerous if negligently made. In substance, therefore, *MacPherson* adopted a straightforward negligence rule, under which the manufacturer of a defective product is liable to any person who would foreseeably be injured as a result of the manufacturer's negligence, whether or not that person is the manufacturer's immediate buyer.

However, Cardozo did not formally overrule the precedents. Instead, he used a result-based approach to transform the previous rule by a radical reconstruction of the precedents. *Thomas v. Winchester*, *Devlin v. Smith*, and *Statler v. Ray*, he concluded, supported the rule adopted in *MacPherson*, because all

¹⁴ *Statler v. George A. Ray Manufacturing Co.*, 195 N.Y. 478, 88 N.E. 1063 (1909).

¹⁵ *MacPherson*, 217 N.Y. at 389, 111 N.E. at 1053 (emphasis added).

those cases had imposed liability on a negligent manufacturer – never mind that they did so by stating a rule different from the rule that *MacPherson* adopted. *Loop v. Litchfield*, which had held in favor of the manufacturer of a defective circular saw, and *Losee v. Clute*, which had held in favor of the manufacturer of a defective steam boiler, were distinguished on the ground that on the facts of those cases the defendants were insulated by standard negligence defenses – even though those defenses were not the basis of the courts’ decisions. Under all the circumstances of those cases, Cardozo suggested, there might not have been a lack of due care by the manufacturer, and even if there was, the manufacturer’s immediate buyer had assumed or made himself responsible for the risk. By using the result-based approach, therefore, Cardozo was able to establish a rule that was based on the precedents but that was contrary to the rule the precedents had explicitly adopted.

In short, there are two completely different approaches to establish the rule for which a precedent stands, and these two methods often produce opposed rules. The availability of a choice between these two approaches might appear to allow courts almost unlimited discretion to establish the rule for which a precedent stands. In fact, however, this is not so, because that discretion is drastically cabined by the basic principle of legal reasoning, together with certain institutional considerations.

The principal institutional consideration is that it is desirable for judicial reasoning to begin with explicitly adopted rules. The traditional view of *stare decisis* stresses that a court’s power to make law is reined in by the concept that what the court says is less important than what it does. In reality, however, as *Donoghue* illustrates, the result-based approach permits the construction of almost numberless rules from any single precedent. Therefore, if deciding courts were required or even encouraged to use that approach as a matter of course, the law would be extremely uncertain. In contrast, the adopted-rule approach tends to minimize judicial discretion and to maximize the replicability of judicial reasoning by the profession, because determining what rule a precedent explicitly adopted, although not always unproblematic, is a relatively straightforward enterprise in the typical case. Combining that institutional consideration with the basic principle of adjudication, the algorithm for establishing the rule of a precedent is as follows: When the case before a deciding court is covered by a rule explicitly adopted in a precedent that is at least a reasonably good rule, then the court should (and normally will) either apply the explicitly adopted rule or distinguish it in a way that is consistent with the rule. In contrast, when the case before a deciding court is covered by a rule adopted in a precedent that is a poor rule, then the court should (and normally will) either overrule the precedent, use the result-based approach to transform the rule, or distinguish the rule in an inconsistent way. It will be noted that since establishing the rule that a precedent stands for turns in significant part on the basic principle of legal reasoning, and that principle turns in significant part on social propositions, then contrary to some forms of legal positivism, what is the law – or at least,

what is the common law – at any given time turns in significant part on social morality, social policy, and experience.

B. Distinguishing

In the mode of legal reasoning known as distinguishing, the court begins with a rule that was explicitly adopted in a precedent and is literally applicable to the case at hand. The court does not reject the rule, but neither does it apply the rule. Instead, the court determines that the adopted rule should be reformulated by carving out an exception that covers the case at hand. *Thomas v. Winchester* is an example. The court began with the adopted rule that a manufacturer of a product was liable only to its immediate buyers for injuries caused by its negligence in producing the product. That rule was literally applicable to the case at hand. The court did not reject that rule. However, the court reformulated that rule by carving out an exception for products that if negligently made are imminently dangerous to human life.

As shown in Part III.A., in establishing the rule of a precedent the courts have a choice – a constrained choice – between applying the adopted-rule approach and the result-based approach. Which approach should and normally will be used depends on the basic principle of legal reasoning – that is, on whether the adopted rule is at least a reasonably good rule, on the one hand, or a poor rule, on the other. Similarly, in distinguishing, the courts have a choice between consistent and inconsistent distinguishing. Which approach should and normally will be used also depends on the basic principle of legal reasoning.

1. CONSISTENT DISTINGUISHING. Consistent distinguishing of a rule explicitly adopted in a precedent occurs when as a result of some feature of the case at hand, one or both of two conditions are fulfilled:

- (1) the social propositions that support the adopted rule do not apply to the case at hand,
- (2) the case at hand implicates a social proposition that does not apply to the typical case covered by the adopted rule.

Consistent distinguishing therefore combines elements of both the adopted-rule and result-based approaches. On the one hand, the court begins with, and does not abandon, the explicitly adopted rule. On the other hand, the court concludes that the adopted rule was formulated without considering some feature that is salient in the case at hand, and that a reformulation of the adopted rule to take account of this feature is consistent with the result of the precedent.

An example is the case, discussed earlier, of bargains with minors. Suppose the explicitly adopted rule is that bargains are enforceable. Now a minor enters into a bargain. The court has never considered whether bargains involving minors should be enforceable against the minor. The adopted rule, that bargains are enforceable, is the best possible rule, and it is literally applicable to the case

at hand. However, the court should and would distinguish the case at hand, and reformulate the adopted rule, by making an exception for minors. That is so because the conditions for consistent distinguishing are fulfilled. The adopted rule rests in part on the social proposition that private actors are the best judges of their own interests. That proposition, however, does not apply to the case at hand, because another social proposition tells us that minors are often not good judges of their own interests.

2. INCONSISTENT DISTINGUISHING. Suppose now that a rule explicitly adopted in a precedent, which is literally applicable to the case at hand, is a poor rule – that is, the rule is substantially incongruent with social propositions. Under the basic principle of legal reasoning, the rule should not be followed. One mechanism that a court can employ to avoid following a poor rule is to use a result-based approach to transform the rule, as Cardozo did in *MacPherson*. A second mechanism is to overrule the precedents that have adopted the rule. That is often desirable, but for a variety of reasons it is a relatively drastic step. There is a third mechanism that the courts can and do employ to avoid following a poor rule. This mechanism is to *inconsistently* distinguish the rule adopted in the precedent – that is, to formulate an exception to the adopted rule that is not justified either by the social propositions that support the rule or by a social proposition that is implicated in the case at hand but does not apply to the typical case covered by the rule.

For example, under the legal-duty rule in contract law, a modification of a contract is unenforceable if one party's performance under the modification would consist only of an act that he was already obliged to perform.¹⁶ This rule is based on the proposition that a party who promises to do only what he is already obliged to do gives up nothing and therefore has not made a real bargain.

The legal-duty rule is a poor rule.¹⁷ Call a party who proposes to modify a contract in such a way that he will receive a higher price but will not render a greater performance, A, and call a party who agrees to such a modification, B. Many modifications are agreed to by persons in the position of B on the basis of a mutual belief that as a result of some initial misapprehension or later changed circumstance, fair dealing requires a readjustment of the contract to reflect either the original purpose of the contractual enterprise, or the equities as they now stand. Other modifications are agreed to by persons in the position of B to reciprocate for past modifications that A has made in B's favor, or because B expects that if he agrees to an appropriate modification in A's favor, A will reciprocate in the future by agreeing to a modification in B's favor where such a modification is equally appropriate. Accordingly, the legal-duty rule conflicts with the values of fair dealing, accommodation, and ongoing cooperation

¹⁶ *Restatement (Second) of Contracts*, § 73 (1979).

¹⁷ See, e.g., Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 *University of California Los Angeles Law Review* 1005, 1034–48 (1998).

between contracting parties, while an enforceability regime promotes those values. Similarly, the legal-duty rule inhibits the dynamic evolution of contracts and dynamic reciprocity between contracting parties, while an enforceability regime serves those ends. An enforceability regime also makes the contracting process more efficient, because it allows parties to enter into contracts without negotiating every possible contingency on an *ex ante* basis, knowing that if misapprehensions or changed circumstances do occur, they can be dealt with by dynamic modifications, *ex post*.

Because the legal-duty rule is a poor rule, a number of inconsistent exceptions have been made to it. Under one exception, the rule is inapplicable where A's contractual duty is owed to a party other than B.¹⁸ This exception is inconsistent with the rule, because it makes bargains enforceable even when A promises only to do what he is already contractually obliged to do – just what the legal-duty rule prohibits. (If the legal-duty rule were justified on the ground that a threat to withhold performance of a contract puts a person in B's position under duress, then it might matter that the duty was owed to a third person, rather than to B. Classically, however, the application of the rule does not turn on whether B was under duress.)

Under another exception, the legal-duty rule is inapplicable where a modification consists of paying that part of a disputed debt that A admittedly owes.¹⁹ This exception is inconsistent with the rule for the same reason that the third-party exception is inconsistent with the rule.

Still other courts have held the legal-duty rule inapplicable by concluding that in the cases before them, the parties had “rescinded” their prior contract and then made a “new” one²⁰ – a conclusion that can be drawn, if a court so desires, in any case that falls within the rule.

Most important, under modern law a modification is enforceable if it is fair and equitable in view of circumstances not anticipated when the original contract was made²¹ – an exception that is both inconsistent with the legal-duty rule and that probably covers the great majority of the cases to which the rule purportedly applies. (The legislatures have also intervened. Many statutes provide that promises within the rule are enforceable if in writing,²² and under the Uniform Commercial Code a promise modifying a contract for the sale of goods is binding despite the rule.²³)

The inconsistent exceptions to the legal-duty rule are justified under the basic principle of legal reasoning. Because the legal-duty rule is a poor rule, under that principle, the rule should not be consistently followed and applied. One

¹⁸ *Restatement (Second) of Contracts*, § 73 comment d.

¹⁹ *Restatement (Second) of Contracts*, § 73 comment f, § 74.

²⁰ See *Schwartzreich v. Bauman-Basch, Inc.*, 231 N.Y. 196, 131 N.E. 887 (1921).

²¹ *Restatement (Second) of Contracts*, § 89.

²² See Cal. Civ. Code, §§ 1524, 1697; Mich. Comp. Laws Ann., § 566.1; N.Y. Gen. Oblig. Law, § 5–1103.

²³ U.C.C., § 2–209.

way not to consistently follow and apply the rule is to formulate inconsistent exceptions to the rule. Consistency in the law is a good, and by hypothesis inconsistent distinguishing conflicts with that good. Nevertheless, the practice of inconsistent distinguishing, if properly employed, is desirable. Inconsistent distinguishing is not a final destination; it is an intermediate step in a dynamic process that should lead to a full-bodied change in the law. It may sometimes be best for courts to move to the best possible rule in steps, even at the price of inconsistency during the transition. A court may properly decide that if it is uncertain how given conduct should be treated, it may give effect to its uncertainty by carving out only a portion of the conduct for special treatment, on a provisional basis, provided the line it carves is rationally related to the court's purpose. For example, a court may believe that a rule adopted in precedent is not even reasonably good and yet may not be confident that its belief is correct. The court may then properly draw an inconsistent distinction as a provisional step toward full overruling. Alternatively, a court may properly formulate an exception at a level of generality that is less than what is necessary for the exception to be fully principled, as a provisional step toward full generality. That is one way to look at the ever-expanding set of exceptions to the legal duty rule.

Inconsistent distinguishing can also be used as a technique for dealing with the problem of reliance. Inconsistent distinguishing allows the courts to protect at least those who relied on the core of a doctrine – that part of a doctrine that cannot be even plausibly distinguished – while signaling to the profession that the underlying doctrine has been advanced to candidacy for overruling. Thus by using the technique of inconsistent distinguishing, a court may simultaneously move toward the best rule, protect past justified reliance on the core of a doctrine, diminish the likelihood of future justified reliance, and prepare the way for an overruling that might not otherwise have been institutionally appropriate.

C. Reasoning by Analogy

Legal commentators have had great difficulty in explaining reasoning by analogy in law. In part, this difficulty has resulted because reasoning by analogy in law may differ from reasoning by analogy in other fields, such as science. In part, this difficulty has resulted because reasoning by analogy in law is sometimes viewed as reasoning by example. It is not. Indeed, it is impossible to reason by example in law. For example, imagine an enormous room in which are the following defective products, and nothing else: On the left-hand side are a defective circular saw and a defective steam boiler. On the right-hand side are a defective coffee urn, a mislabeled bottle of poison, and some defective scaffolding. In the center of the room is a defective electric broiler. A judge is sent into the room. The judge is told that the manufacturers who made the products on the right were obliged to compensate injured persons, but the manufacturers who made those on the left were not. The judge is further told that he cannot

come out of the room until he reasons by example to determine whether the broiler should be placed with the objects on the left or the right. The judge would probably go mad, and would surely starve, unless he mercifully ended his life by taking the poison.

As this illustration suggests, reasoning by analogy in the law does not proceed from example to example. Quite the contrary: It proceeds from rule to rule, just as do the processes of establishing the rule of a precedent and distinguishing. Indeed, at its core, the process of reasoning by analogy in law is the mirror image of the process of distinguishing. In distinguishing, a deciding court normally begins with a rule, explicitly adopted in a precedent, that is literally applicable to the case at hand, and then determines that as a matter of social propositions the rule should not be applied to the case at hand. Accordingly, the court modifies the rule adopted in the precedent, usually by formulating an exception and therefore a new rule. In reasoning by analogy, a court normally begins with a rule, adopted in a precedent, that is *not* literally applicable to the case at hand, and then determines that as a matter of social propositions a generalized version of the rule should be adopted and applied to the case at hand, because there is not a good social reason to treat the case at hand differently. The court therefore extends or modifies the adopted rule – or, what is the same thing, formulates a new rule – in such a way that the precedent and the case at hand are treated alike.

Essentially, therefore, whether a court applies or distinguishes an adopted rule, on the one hand, or reasons by analogy from an adopted rule, on the other, normally depends on the level of generality at which the adopted rule was formulated. If the adopted rule was formulated at a relatively high level of generality, so that it covers the case at hand, the question for the court will be whether to apply the rule to the case at hand, or to reformulate and narrow the rule by drawing a distinction so that as reformulated the rule does not cover the case at hand. If the adopted rule was formulated at a relatively low level of generality, so that it does not cover the case at hand, the question for the court will be whether to reformulate and generalize the rule by drawing an analogy, so that as reformulated the rule covers the case at hand.

Within that general structure, reasoning by analogy in the law falls into two modes. One mode is as follows: There is an established rule, *r*, which in terms covers cases that involve Matter X. The deciding court is now faced with a case that concerns Matter Y. Matter Y does not fall within the ambit of rule *r*, although it would fall within a more generalized rule, *R*. Because Matter X and Matter Y are not identical, treating them differently would be consistent as a matter of formal logic. However, treating Matters X and Y differently would be inconsistent as a matter of legal reasoning, because social propositions do not justify different treatment of the two cases. In effect, the deciding court determines that the statement of the rule by the precedent court in the relatively narrow form *r*, rather than in the relatively general form *R*, was adventitious, or has become so. Perhaps there never was any special reason for stating the

rule in the narrow form. It may be, for example, that the facts involved in the precedent were narrow, and the precedent court adopted a rule in a manner that addressed those facts without deliberately intending to limit the rule to those facts. Or perhaps there was a good reason to state the rule narrowly when it was adopted, but social propositions have changed, so that the narrow statement is no longer sensible. In either event, the deciding court concludes that Rule *r*, which covers only Matter X, should now be deemed only a special case of Rule *R*, which covers both Matters X and Y. The court therefore reformulates the rule by generalizing it, and decides the case at hand accordingly.

For example, prior to the end of the nineteenth century, there was a rule that a husband could bring suit for the alienation of his wife's affections by a third person. It was not entirely clear why the rule was narrowly formulated to allow suits only by husbands, not by spouses. The narrow formulation of the rule might have had a substantive basis. Maybe the courts believed, based on then-current social propositions, that a wife did not suffer a cognizable injury when her husband's affections had been alienated. Alternatively, the narrow formulation might have been based on a procedural rule. Early on, a married woman was not permitted to bring a suit of any kind in her own name.

Eventually, the procedural rule was changed to allow married women to sue in their own names. The substantive question then had to be faced – whether a wife suffered a cognizable injury if her husband's affections had been alienated. In *Bennett v. Bennett*,²⁴ the New York court held that the wife did suffer such an injury, because social propositions either no longer supported, or never supported, treating a wife differently from a husband for this purpose:

The actual injury to the wife from the loss of *consortium*, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character and attach to the husband as husband and to the wife as wife. . . . A remedy . . . has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle and are caused by acts of the same nature as those of the husband, the remedy should be the same. What reason is there for any distinction? Is there not the same concurrence of loss and injury in the one case as in the other? Why should he have a right of action for the loss of her society unless she also has a right of action for the loss of his society? . . . Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her? Does not she need the protection of the law in this respect at least as much as he does? Will the law give its aid to him and withhold it from her?²⁵

Thus in *Bennett* the court concluded that the established rule that a *husband* could bring an action for alienation of affections (Rule *r*) should be reformulated

²⁴ *Bennett v. Bennett*, 116 N.Y. 584, 23 N.E. 17 (1889).

²⁵ *Bennett*, 116 N.Y. at 590–591, 23 N.E. at 18–19.

into the more general rule that a spouse could bring such an action (Rule *R*), because at the time of the decision, at least for this issue social propositions did not support a distinction between the narrow class of husbands and the general class of spouses.

Oppenheim v. Kridel,²⁶ which arose about thirty years after *Bennett*, shows even more clearly how reasoning by analogy operates by broadly reformulating an existing adopted rule. The issue in *Oppenheim* was whether a wife could bring an action for criminal conversation. Early on, criminal conversation was an action by a husband against his wife's paramour, based simply on the paramour's adultery with the wife. The action did not require a showing that the paramour had also alienated the wife's affections for her husband. In the case of the action for alienation of affections, it was at least arguable that a wife's original inability to bring the action was because of a procedural obstacle. In the case of the action for criminal conversation, however, it was clear that the reason for the narrow formulation of the established rule was substantive: "The husband, so it was said, had a property in the body, and a right to the personal enjoyment of his wife, for the invasion of which right the law permitted him to sue as husband."²⁷ Under the social propositions that underlaid the established rule, the wife was deemed not to have a corresponding interest.

The court in *Oppenheim* nevertheless reasoned by analogy to hold that a wife could bring an action for criminal conversation. If a husband could bring such an action, so could a wife, because even if social propositions once justified treating husbands and wives differently for this purpose, they no longer did:

[W]hatever reasons there were for giving the husband at common law the right to maintain an action for adultery committed with his wife, exist to-day in behalf of the woman for a like illegal act committed with her husband. If he had feelings and honor which were hurt by such improper conduct, who will say to-day that she has not the same, perhaps even a keener sense, of the wrong done to her and to the home? If he considered it a defilement of the marriage-bed, why should not she view it in the same light? The statements that he had a property interest in her body and a right to the personal enjoyment of his wife are archaic unless used in a refined sense worthy of the times and which give to the wife the same interest in her husband. . . . The danger of doubt being thrown upon the legitimacy of the children, which seems to be the principal reason assigned in all the authorities for the protection of the husband and the maintenance of the action by him, may be offset by the interest which the wife has in the bodily and mental health of her children when they are legitimate. . . . So far as I can see there is no sound and legitimate reason for denying a cause of action for criminal conversation to the wife while giving it to the husband. Surely she is as much interested as the husband in maintaining the home and wholesome, clean and affectionate relationships. Her feelings must be as sensitive as his toward the intruder, and it would be mere willful blindness on the part of the courts to ignore these facts.²⁸

²⁶ *Oppenheim v. Kridel*, 236 N.Y. 156, 140 N.E. 227 (1923).

²⁷ *Oppenheim*, 236 N.Y. at 160, 140 N.E. at 228.

²⁸ *Oppenheim*, 236 N.Y. at 161–162, 140 N.E. at 229.

A second mode of reasoning by analogy in the common law, which is closely related to the first, proceeds by determining that one new rule, Rule A, should be adopted in preference to a competing new rule, Rule B, because social propositions would not justify adopting Rule B while adhering to some *other* previously adopted rule. For example, in *Oppenheim* the court concluded that it would be inconsistent to retain the rule that a wife could not bring suit for criminal conversation while adhering to the rule, established in *Bennett*, that a wife could bring suit for alienation of affections:

When we concede that a wife may maintain an action for alienating the affections of her husband, we virtually admit that she may also maintain an action for criminal conversation. While adultery is the sole basis of the latter, it is almost universally the chief element of evidence in the former.²⁹

*Ploof v. Putnam*³⁰ is another, more famous, example. Ploof, the plaintiff, alleged that he and his family were sailing in his sloop on a lake when a violent tempest suddenly arose. The tempest placed the sloop and its passengers in great danger. To avoid injury to Ploof and his family, and destruction of the sloop, Ploof was compelled to moor the sloop to a dock on an island in the lake. The dock was owned by Putnam, whose agent unmoored the sloop. Thereafter, the sloop was driven onto the shore by the tempest, its contents were destroyed, and Ploof and his family were injured. Ploof sued Putnam for damages.

The court held that Ploof had stated a claim for relief. It reached this conclusion in large part by reasoning from cases holding that a landowner could not recover damages for trespass against a person who intruded on the land under necessity. As a matter of formal logic, it would not have been inconsistent to hold that although a landowner cannot recover damages for trespass against an intruder who entered under necessity, the intruder cannot sue the landowner if the latter used self-help to eject the intruder. Therefore, the question in *Ploof* was whether a rule that allowed a landowner to use self-help against an intruder who entered under necessity would be consistent as a matter of social propositions with a rule that the intruder was not liable in damages for the unauthorized entry. The answer was no. The law denies a landowner a right to damages against one who intrudes under necessity because the purpose of saving life is more important than the purpose of giving inviolate status to property. This social reason applies equally well when the issue is whether the landowner has the right to eject the intruder by self-help. Accordingly, it would be inconsistent as a matter of social propositions to adopt a rule that a landowner has a right to use self-help to eject one who intrudes under necessity, while adhering to the rule that the landowner cannot recover damages based on such an invasion.

²⁹ *Oppenheim*, 236 N.Y. at 166, 140 N.E. at 231.

³⁰ *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908).

How does the basic principle of legal reasoning figure into reasoning by analogy? The answer is that if a deciding court concludes that the rule established in a precedent is at least a reasonably good legal rule, the court should and normally will extend the rule by analogy where a generalization of the rule is appropriate. If, however, a deciding court concludes that the rule established in a precedent is a poor legal rule, the court should not, and normally will not, extend the rule by analogy. Instead, the court will say that the precedent should be confined to its facts.

IV. Conclusion

The basic principle of legal reasoning is as follows: A doctrinal rule should be consistently applied and extended if it is the best possible rule because it is fully congruent with social propositions or, even if it is not the best possible rule, if it is a reasonably good rule because it is substantially congruent with social propositions. However, a doctrinal rule should not be consistently applied and extended if it is a poor rule because it is not even substantially congruent with social propositions.

The question might be asked, if social propositions are critical in legal reasoning, and if the force of a rule adopted in a precedent depends on social propositions, why do social propositions seem not to be as prominent as doctrinal propositions in the typical judicial opinion? The answer is that social propositions always figure in legal reasoning, but they often play an implicit rather than an explicit role. At any given time, most common law rules are likely to be at least substantially congruent with social propositions. The reason is that when a new rule is adopted, it will usually be congruent with social propositions – that is why it is adopted – and if a new rule is not congruent with social propositions, or an existing rule becomes incongruent, the rule will likely be changed as a result of criticism by the profession in the secondary literature, in briefs, and in opinions in other jurisdictions. Where the profession, including the judiciary, implicitly views a rule as substantially congruent with social propositions, there is little or no occasion for explicitly invoking social propositions in legal reasoning that involves the application of the rule. Accordingly, social propositions figure in all legal reasoning, but play an explicit role only when a new rule needs to be adopted, when an existing rule becomes a candidate for transformation or overruling, or when the issue arises whether an existing rule should be distinguished, on the one hand, or extended by analogy, on the other.

A Similibus ad Similia

Analogical Thinking in Law

GERALD J. POSTEMA

I. Judgment, Precedent, and Example

The *Codex* officially and resolutely set its face against reasoning by analogy: *non exemplis sed legibus iudicandum est*, it decreed.¹ Orthodox logicians had deeper reservations. They insisted that *exempla illustrant non probant*; that is, as Francis Bacon put it, “examples may make things plain that are proved, but prove not themselves.” However, Bacon recognized a more significant role for analogy in reasoning when he added, “yet, when circumstances agree, and proportion is kept, that which is probable in one case is probable in a thousand, and that which is reason once is reason ever.”² It was the latter view, and not the skepticism of the *Codex* or the logicians, that took root deep in common law soil. Bracton, for example, advised, “If new and unusual matters arise which have not before been seen in the realm, if like matters arise let them be decided by like, since the occasion is a good one for proceeding from like to like” (*a similibus procedere ad similia*). This reasoning, which he called “equity,” “is the bringing together of things, that which desires like right in like cases and puts all things on an equality. And equity is, so to speak, uniformity” (*quasi aequalitas*).³ The seventeenth-century common lawyer John Doddridge added, “Equitie therefore in all the use thereof . . . hath a double Office, Effect, or Function. Sometimes it doth amplifie. Sometimes againe (when reason will) it doth diminish or extenuate.” Analogical reasoning in common law is used both to extend and to distinguish precedent judgments. Cases “differing ever so

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¹ *Justinian Code*, Book VII, title 45, paragraph 13.

² Francis Bacon, “Letter to Earl of Rutland” in *The Letters and the Life of Francis Bacon* (James Spedding, ed.) (vol. 2) (Longmans, Green, 1861–74), 196.

³ Henry de Bracton, *Bracton on the Laws and Customs of England* (1250/1259) (Samuel E. Thorne, ed.) (vol. 2) (Harvard University Press, 1976), 21, 25.

much in circumstance [if they nevertheless] concur in reason should be ruled after one and the self same manner.”⁴

Much has changed since the seventeenth century, but common lawyers still seem to ply their trade with the same tools. “[T]he usual job of the lawyer,” writes the United States Court of Appeals for the Sixth Circuit, “is to make arguments as to why the case at bar is more like one case than another based on inferred principles that appear to justify judgments in particular cases.”⁵ Moreover, according to some reflective practitioners, “reasoning by example” is not just one tool among others in the lawyer’s toolkit; it is, rather, “the basic pattern of legal reasoning.”⁶ There is, I believe, a good bit of truth in that overstatement, but it is no overstatement to say that “one’s notion of the process by which a judgment is transformed into a precedent [and example] . . . determines one’s whole conception of the common law.”⁷

The task of this chapter is to explore the nature of the process by which, as Justice Benjamin Cardozo put it, judicial judgments beget other judgments in their own image.⁸ In particular, I explore the nature and role of analogical thinking in law. Richard Posner, never one to pull punches, sets the challenge for this study: Analogical thinking, he wrote, “has an impeccable Aristotelian pedigree, but no definite content or integrity . . .”⁹ This skepticism is unwarranted, I will argue; analogical thinking has impeccable intellectual integrity, an honorable rational as well as historical pedigree, and an indispensable role in legal reasoning. However, despite its pedigree and very long practice, analogical reasoning is still not well understood. In this essay I defend a revised version of what I take to be the orthodox or classical, but now often scorned, common law understanding of analogy.

II. Analogical Reasoning: The Classical Common Law Conception

Analogical reasoning can be found throughout the practice of law, from the medieval strategy of arguing from “equity of a statute”¹⁰ and the modern doctrine of *ejusdem generis* construction of statutes¹¹ to arguing from the “example”

⁴ John Doddridge, *The English Lawyer* (Moore, 1631), 63–4.

⁵ *United States v. Strickland*, 144 F.3d 412, 416 n.4 (6th Cir. 1998).

⁶ Edward H. Levi, *An Introduction to Legal Reasoning* (University of Chicago Press, 1949), 1.

⁷ Abraham Harari, *The Place of Negligence in the Law of Torts* (Law Book Company of Australasia, 1962), 6.

⁸ Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921), 21.

⁹ Richard Posner, *The Problems of Jurisprudence* (Harvard University Press, 1990), 86.

¹⁰ See J. W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Johns Hopkins University Press, 2000), 40.

¹¹ *Osborn v. Wilson & Co.*, 193 N.Y.S. 241, 242 (N.Y. Sup. Ct. 1922). See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 *Harvard Law Review* 923, 937–8 (1996).

of certain statutes to broad changes in what are traditionally thought to be domains of decisional law.¹² An especially rich example of cross-categorical analogical reasoning is found in *Javins v. First National Realty Corporation*.¹³ The case raised the question whether a landlord's housing code violations affect the tenant's obligations to pay rent under the lease. Traditionally understood, a lease was a conveyance of an interest in land and so fell squarely within traditional property law. The court argued, however, that the modern apartment lease had far more in common with contractual arrangements like rental of chattel and sale of goods than the common law lease of land. Arguing from a remarkably detailed exploration of the legal and social contexts of these relationships, the court concluded that there is an implied warranty of habitability in leases of urban dwellings that operates in a manner similar to the implied warranty of merchantability of goods.

However, the classical common law understanding of analogical reasoning focuses primarily on local, case-by-case judicial reasoning, and, accordingly, I will restrict my attention in this chapter to analogical reasoning in that context. If what I shall argue is plausible, then there is hope that my view can be extended, perhaps *mutatis mutandis*, to other uses of analogical reasoning, but I will not here make the case for such an extension.

A. Reasoning with Cases, Like and Unlike

John Austin offers a familiar characterization of analogical reasoning in his *Lectures on Jurisprudence*, "analogy denotes an intellectual process" that involves "an inference, or a reasoning or argumentation, whereof an analogy of objects is mainly the cause or ground." He suggested that the inference has the following structure: Two or more individuals or cases "are allied by a given analogy." Prior to the reasoning, something is known about some of those cases (call them "source" analogues) that is not known about another (call it the "target" analogue): "From the given analogy, however, which connects these objects with one another, the following inference is drawn: Namely, that the given something which is true of one or some of these objects [the source analogues], is true of the other or rest [the target analogues]."¹⁴

We can enrich this characterization by considering a few examples. In *Dixon v. Bell*,¹⁵ the defendant sent a young servant to collect a gun from his landlord with a note instructing the landlord to remove the priming. The landlord did so in

¹² See *Moragne v. States Marine Lines*, 398 U.S. 375 (1970); Patrick Atiyah, *Common Law and Statute Law*, 48 *Modern Law Review* 1 (1985); Gehan N. Gunasekara, *Judicial Reasoning by Analogy with Statutes: Now an Accepted Technique in New Zealand?*, 19 *Statute Law Review* 177 (1998).

¹³ 428 F.2d 1071 (D.C. Cir. 1970).

¹⁴ John Austin, *Lectures on Jurisprudence* (Robert Campbell, ed.) (vol. 2) (5th ed.) (John Murray, 1885), 1005.

¹⁵ *Dixon v. Bell*, (1816) 2 Maule & Selwyn's 198.

the presence of the servant but inadvertently left a little priming in the gun. The servant playfully pointed the gun at the plaintiff's son and it went off, injuring the boy. The court held for the plaintiff. Sixty years later a defendant set up a spiked fence across the road leading to his stadium to discourage gatecrashers. Someone moved it, placing it across a footpath, and the plaintiff injured his eye while walking the path at night. The court in *Clark v. Chambers*,¹⁶ judging the case analogous to *Dixon*, decided for the plaintiff. The circumstances were, of course, quite different in the two cases, and yet similar enough in the judgment of the court to warrant a like judgment of right.

Of course, the new case may be judged to be significantly different from precedent cases and on that basis treated differently. The novel case may share some important features with precedent cases but not others, and they may make all the difference. This seems to have been the case in *Miller v. Race*.¹⁷ The defendant, Mr. Finney, stopped payment on a bank note that had been stolen in a mail robbery. In the meantime, however, the plaintiff had acquired the note innocently and for consideration. When he presented the note for payment, the bank refused. Counsel for the defendant argued that the action was not for the note but for the money due on the note and that the note was only evidence of the debt. The note, however, was property still rightfully owned by Mr. Finney: "[T]hese goods . . . [are] like a medal which might entitle a man to payment of money, or any other advantage. And it is by Mr. Finney's authority and request that Mr. Race [acting for the bank] detained it."¹⁸ Lord Mansfield rejected this argument, however, charging that the defendant's argument rested on a mistaken analogy:

[T]he whole fallacy of the argument turns upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz., goods, or to securities, or documents for debts. Now they are not goods, nor securities, nor documents, for debts, nor are so esteemed: but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes.¹⁹

As Doddridge reminded us, finding a sound basis for distinguishing the cases is, of course, also an exercise of analogical reasoning.

This suggests a further important feature of typical common law analogical reasoning. Determination of analogy is seldom a matter of simply identifying analogues in precedent cases and inferring from them, for the court is presented with, or has more or less in view, a range of "competing analogies" – that is, competing candidates for source analogues that may pull in different directions. Typically, the analogy ultimately fixed upon is the product of the pressure exerted by the case before the court and the competing candidates. A familiar

¹⁶ *Clark v. Chambers*, (1878) 3 Q.B.D. 327.

¹⁷ *Miller v. Race*, (1758) 1 Burr. 452, 97 Eng. Rep. 398.

¹⁸ *Miller*, 1 Burr. at 453.

¹⁹ *Miller*, 1 Burr. at 457.

illustration of this aspect of analogical reasoning is Cardozo's classic analysis in *Hynes*.²⁰ Sixteen-year-old Harvey Hynes was swimming with his buddies in the Harlem River. From a board extending from the New York Central Railway's bulkhead they dove into the water. Poles for electric wires on the defendant's property were in serious disrepair. Harvey Hynes was struck and killed by falling wires while standing on the diving board. In the view of the plaintiff's lawyers, Harvey was an innocent bather who lost his life because of the defendant's negligence. Because owners have a duty of care to innocent passersby on adjacent public ways, the defendant was liable for the death. Defendant's counsel countered that Harvey was a trespasser and defendant owed no duty of care to trespassers. Opposed source analogues competed for precedence. In a classic piece of common law reasoning, Justice Cardozo set the competing analogies in the concrete circumstances of the boys' summer recreation. Assessing the case in this wider context, Cardozo concluded that Harvey Hynes was an innocent bather.

Against this background, we can hazard a rough characterization of what we might call the classical common law understanding of analogical reasoning. First, proceeding by way of analogy is an intellectual process, a form of reasoning, with a legitimate (if possibly limited) claim to practical force. Second, it takes the general form of an inference from observed similarities among precedent and novel cases to the appropriateness of, or warrant for, deciding the novel case in the same way as its analogues. Third, this form of reasoning does not necessarily involve applying a general rule to a particular case. Rather, it proceeds *a similibus ad similia* – "from part to part and like to like," as Aristotle put it.²¹ Bruce Chapman puts the point this way: "What justifies a particular decision on a given set of facts in adjudication is not some prior and independent normative rule that subsumes the facts (a relation between the general and the particular), but rather just a relation that the given facts bear to the facts of some earlier decision (a relation between two particulars)."²² This is not to say that articulation of a rule plays no role in analogical thinking according to this conception, but only that any such general rule will be a product of the identified analogy, not its precondition. In the order of intellection, identification of the "likeness" precedes and provides the basis for the articulation of the rule.²³ Moreover, any particular court's attempt to articulate the rule of some precedent

²⁰ *Hynes v. New York Central Railroad Co.*, 231 N.Y. 229, 131 N.E. 898 (1921).

²¹ Aristotle, *Rhetoric*, Book I, ch. 2, 1357b, 26ff (quoting his *Prior Analytics*, Book II, ch. 24, 69a, 13–20).

²² Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 University of Chicago Law Review 41, 66 (1994).

²³ Chapman, *The Rational and the Reasonable*, 61 University of Chicago Law Review at 67; Zenon Bankowski, "Analogical Reasoning and Legal Institutions" in Patrick Nerhot, ed., *Legal Knowledge and Analogy: Fragments of Legal Epistemology, Hermeneutics and Linguistics*, (Kluwer, 1990), 207.

case or line of cases is corrigible, open to reformulation by a subsequent court, testing any formulation against further like and unlike cases.

B. Resemblances Are a Slippery Tribe

This understanding of analogical reasoning does not suffer from complacent acceptance among either contemporary practitioners or theorists of the common law. Skepticism is orthodoxy. It springs from a double fountain. Thinking analogically, skeptics argue, is theoretically bankrupt and practically pernicious.

Analogical reasoning, Richard Posner maintains, is “not actually a method of reasoning” – that is, despite appearances, it is not a matter of logically or rationally “connecting premises to conclusions.”²⁴ At best, it is a technique for “querying (or quarrying)” earlier cases for policies, ideas, and information that can often be suggestive of solutions to problems thrown up in litigation.²⁵ He warns that we should not confuse the heuristics of discovery with the logic of justification.²⁶ Similarly, Ronald Dworkin asserts that “an analogy is a way of stating a conclusion, not a way of reaching one.” Analogy plays no argumentative role in legal reasoning; “theory must do all the real work.” Analogy without theory or principles is blind, and analogy with theory is redundant.²⁷ This summary dismissal of analogical reasoning rests on an equally summary argument: Two cases are analogues just in case they share some properties that are regarded as relevant to the legal purposes in play. But, it is argued, that is just to say that they are analogues just in case there is some rule, principle, or theory in light of which these properties are relevant and legally significant. Thus, two cases are analogous only as a *consequence* of their falling under the principle. It is not possible to move from one case to a rationally warranted conclusion in another without stepping on the rock of theory, and one cannot get to that rock from a sense of the relevant similarities between the cases, because that sense presupposes the theory; but once on that rock the sense of the similarity between the cases no longer has any argumentative work to do.

Posner sums up the problem with this dictum: “there must be a theory. One cannot just go from case to case, not responsibly anyway.”²⁸ But this seems to add a further note, suggesting that, theoretical bankruptcy aside, there are normative reasons for skepticism of the practice of analogical thinking in law: Responsible judging and lawyering do not permit it. Critics offer three main reasons for excluding, or evicting, analogy from the courthouse. First, analogical thinking tends to be excessively narrow, formalist, and conservative,

²⁴ Posner, *Problems of Jurisprudence*, 93 (emphasis in original). See generally *id.* at 86–98.

²⁵ Richard Posner, *Overcoming Law* (Harvard University Press, 1995), 518. See generally *id.* at 517–22.

²⁶ Posner, *Problems of Jurisprudence*, 91.

²⁷ Ronald Dworkin, *In Praise of Theory*, 29 *Arizona State Law Journal* 353, 371 (1997).

²⁸ Posner, *Overcoming Law*, 175.

blind to policy and to the contributions to judicial deliberation of science, engineering, and economics.²⁹ Second, it disguises change of legal doctrine as continuity, which makes it difficult to track, understand, and evaluate legal change.³⁰ Third, without direction from explicit principle, analogical reasoning falls short of legitimate demands for articulate public justification: "The mere assertion of an analogy may, it is true, have persuasive force in a psychological sense. . . . But judges aspire to more than rhetorically effective, emotionally compelling, or even perspective-altering expression . . . just as they aspire to more than the ability to decide cases on sound but inarticulable grounds."³¹ If the grounds of judicial judgments cannot be fully articulated by appeal to explicit principles, the judgments cannot be regarded as normatively justified in light of our standards for responsible judging.

III. The Dialectic of Rules and Cases

"[R]esemblances above all," Plato's Eleatic Stranger warned, "are a most slippery tribe."³² This seems right, but we can accept the warning without abandoning the classical understanding of analogical reasoning in law to skepticism. The practical objections must be addressed, of course, but the more fundamental objection is the theoretical one. If we are to meet the challenge of skepticism, we must address it first. We can best appreciate the force of this objection if we set it in the dialectic between particularist and rule-rationalist theories of analogical reasoning.

A. Particularism

Analogy skeptics tacitly assume that underlying the classical conception of analogical reasoning is a robust form of particularism. Particularism brings together a substantive thesis concerning the nature of the relation between like cases and an epistemological thesis concerning our mode of access to this relation. The substantive thesis is that reasons for practical decisions and actions lie solely in the unique, concrete facts of particular practical situations. Because particulars "give the intrinsically practical response which constitutes reasons," Michael Detmold writes, "it is to the particulars of the precedent that I must attend if I am to learn the practical business of judging hard cases." Thus, "[i]f I am to learn how to weigh reasons in law cases it can only be from the example of precedent cases."³³ Analogical reasoning, on this view, is a corollary of the

²⁹ Posner, *Overcoming Law*, 518–19.

³⁰ Posner, *Problems of Jurisprudence*, 92–3.

³¹ Posner, *Problems of Jurisprudence*, 92.

³² Plato, *Sophist* 231a.

³³ Michael J. Detmold, *The Unity of Law and Morality: A Refutation of Legal Positivism* (Routledge and Kegan Paul, 1984), 179.

view of reasons: It is just the movement of practical reason from particular case to particular case.

How is this movement of reason – the reason-relevant similarity among cases – grasped? Inspired by Aristotle's thought that "discernment rests with particulars,"³⁴ particularists maintain that it is grasped not by applying some general rule or principle to the specific cases in view but rather by some form of immediate insight – as if, by "looking at [the cases] side by side and rubbing them together we may perhaps make justice flash forth as from fire-sticks."³⁵ Some describe this mode of access in terms of *intuition* or *perception* (following Aristotle), or a matter of *feeling* (following Mill); others see in it the genius of *imagination* (following Hume), still others as relatively mindless everyday coping skills (following Heidegger), and some even (taking a naturalist turn) see it as a "native flair for projectible traits" or a biologically hardwired *disposition* to recognize some projected patterns rather than others.³⁶ Common to these widely varying descriptions is the view that the mode of access is direct, immediate, and ultimately ineffable.

There is no wonder why rationalists respond with skepticism to this defense of the classical conception of analogical reasoning. The substantive thesis is vulnerable to the obvious objection that the reason-giving or reason-constituting facts cannot be logically particular, because in order to count *as reasons*, they must be logically repeatable, and so their descriptions must be universalizable. Critics press the argument further. For example, Michael Moore argues that

the notion of similarity just cannot support the rule-less, a priori inference pattern particularists ascribe to lawyers... The relation of similarity presupposes the existence of properties that make one case similar to another; properties can be described by rules... There is thus no amount of rule-less staring at particulars that can justify a judgment of similarity.³⁷

Peter Westen adds that, according to the classical conception,

reasoning by analogy a person first identifies legally relevant similarities and then formulates a legal rule to explain the similarities. In reality the process of reasoning is

³⁴ Aristotle, *Nicomachean Ethics*, Book II, ch. 9, 1109b, 23–4.

³⁵ Plato, *Republic* 434e–435a, quoted in G. E. R. Lloyd, *Polarity and Analogy: Two Types of Argumentation in Early Greek Thought* (Cambridge University Press, 1966), 397.

³⁶ Aristotle, *Nicomachean Ethics*; John Stuart Mill, *System of Logic* Book I, ch. 3, § 11 in *Collected Works of John Stuart Mill* (J. M. Robson, ed.) (vol. 7) (University of Toronto Press, 1973), 70; David Hume, *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* (3rd ed.) (L. A. Selby-Bigge and P. H. Nidditch, eds.) (Oxford University Press, 1975), 308–9; Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 *Yale Law Journal* 253, 268 (1996) (quoting Hubert L. Dreyfus, *Being-in-the-World: A Commentary on Heidegger's Being and Time* (MIT Press, 1990), 3); W. V. Quine and J. S. Ullian, *The Web of Belief* (Random House, 1978), 89; Philip Pettit, *The Reality of Rule-Following*, 99 *Mind* 1 (1990).

³⁷ Michael S. Moore, "Precedent, Induction, and Ethical Generalization" in Laurence Goldstein ed., *Precedent in Law* (Oxford University Press, 1987), 192.

precisely the opposite. One can never declare A to be legally similar to B without first formulating a legal rule of treatment by which they are rendered relevantly identical. Why? Because that is what the terms legally similar, equal, the same, and alike mean. They mean that A and B are prescriptively identical by reference to a given prescriptive rule of treatment.³⁸

This criticism surely is apt if particularism claims both that the reasons of cases are logically particular *and* that the cases function *as examples*. The particularist substantive thesis is incoherent, for something can function *as a reason* and *an example* only if it can guide reason-responsive agents with respect to actions in other cases, and the particularist's understanding of reasons does not seem to allow for this. But, for this reason, it would seem to be a mistake to shackle the classical conception of analogical reasoning to the particularist's logical thesis, for it is precisely *guidance by examples* that is at the heart of that conception.

Actually, Westen's argument goes beyond the uncontroversial logical point about universalizability. He not only observes that examples are normatively universal, but he concludes from this observation that to identify two cases as similar one must first "formulate" or appeal to a rule that marks the cases as alike. This, however, is not entailed by the initial observation. Of course, the conclusion might just be an awkward way of putting the point that *in* grasping that two cases are relevantly similar one grasps *a rule* – that is, one grasps that they properly go together and so should be treated as members of a class that is not restricted to those two cases. But that is just to say what we noticed before: Thinking analogically requires regarding some cases *as examples*. Thus, it is misleading at best for Westen to suggest that to take two cases as analogues requires that one *first* and *independently* grasp – let alone that one *formulate* – a rule.

Actually, this is not only misleading; it is a mistake, a view as worthy of skepticism as particularism is. I will defend this criticism presently and my defense will leave us with the question how to escape the incoherence of particularism without succumbing to rule-rationalist dogma. The first step in doing so involves putting distance between the classical conception of analogical reasoning and the particularist's epistemological thesis. This is easy to do, for it is crucial to the classical conception that we regard analogical thinking in law as discursive rather than intuitive; a matter of argument rather than perception or feeling; a form of reasoning, not just a mode of insight. Skeptics rightly reject the implicit arationalism of particularist epistemology, but for that very reason, I believe, particularism is not an adequate theoretical foundation for the classical understanding of the role of analogy in law.

³⁸ Peter Westen, *On "Confusing Ideas,"* 91 Yale Law Journal 1153, 1163 (1982).

B. Rule-Rationalism

Rule-rationalists insist that reasoning meant to *justify* judgments, decisions, and actions necessarily relies on rules or principles. (It is not important at this point to distinguish between rules and principles.) The argument we have considered for this thesis was inadequate, but another one is in the offing.³⁹ I will call it “the relevance argument.” It begins with the observation that, although analogical reasoning is based on inference drawn from similarities between cases, “similarity” is not merely a matter of two cases’ sharing features or properties, even a very large number of them. It is entirely possible that A and B are closer analogues than A and C even though A apparently shares more features with C than with B. (Of course, we may have no handy way of counting shared facts or properties, but that supports rather than undermines the point here.) Analogical thinking depends as much on an ability to discriminate as an ability to relate. Analogical inference depends on a grasp of *relevant* similarities and thus on an ability to assign some features of the cases to the explanatory or deliberative background and to bring others to the foreground. Thus, two cases are analogous just when they are similar *in relevant respects* and their relevant similarities are greater or more important than differences between them. Second, it is argued that, necessarily, relevance is determined by the norm or rule that supplies criteria of relevance. It follows that “no example can serve as an example without a rule to specify what about it is exemplary,”⁴⁰ and this rule acts as a prescriptive guide to thought.⁴¹ If analogical thinking is “a reasoning process, as opposed to an intuitive grasping of likeness and difference, it will require postulating a norm or set of norms that ‘justify’ the precedents and prescribe an outcome in the case at hand.”⁴²

Note that this argument claims not only that for every true analogy *there is* a general proposition (call it a “rule”) that captures exactly the respects in which the analogues are relevantly similar, but it insists further that the rule is *prior* to the cases. Brewer puts the point sharply: An instance “does not *inherently* exemplify any particular rule . . . but rather becomes an *example* of one rule or the other only by virtue of the rule itself.”⁴³ There are at least three respects in which the rule is thought to be prior to the cases. First, it is the rule that *makes it the case* that the two cases are analogues – the rule has *constitutive* priority – and, second, in virtue of that fact, the rule *justifies* the inference from the source analogue to the target analogue – it has *normative* priority. In this dual sense,

³⁹ See, e.g., Brewer, *Exemplary Reasoning*, 109 Harvard Law Review at 973–4; Larry Alexander, *The Banality of Legal Reasoning*, 73 Notre Dame Law Review 517, 526 (1998).

⁴⁰ Brewer, *Exemplary Reasoning*, 109 Harvard Law Review at 974.

⁴¹ Brewer, *Exemplary Reasoning*, 109 Harvard Law Review at 973 n. 158.

⁴² Alexander, *The Banality of Legal Reasoning*, 73 Notre Dame Law Review at 526.

⁴³ Brewer, *Exemplary Reasoning*, 109 Harvard Law Review at 975.

the rule *grounds* the judgment of analogy and the inference based on it. That is to say, there is no rationally warranted inference from the source analogue to the target except through the constitutively and normatively prior rule. Finally, the argument claims also that the rule serves as a guide for thought of those who engage in analogical thinking – it has *epistemic* priority – or at least it is their guide when they are engaging in analogical reasoning (as opposed to following a hunch or having an intuitive grasp of likeness and difference). Unlike Westen’s argument, this argument does not explicitly endorse the further claim that this rule is in principle capable of being explicitly formulated, but it would be hard to understand why, given the first three points, a rule-rationalist would resist this corollary.

The relevance argument is an elaborated version of the argument that motivated Posner, Dworkin, and other skeptics to deny that analogical thinking is a form of reasoning (theory does all the work). Yet, some who embrace the relevance argument hope to resist the skeptical conclusion. The most interesting version of this “modest rationalism” is that proposed by Scott Brewer, but one can find anticipation of his view in Lord Diplock’s discussion in *Dorset Yacht*.⁴⁴ Lord Diplock described a two-stage process. First, under the guidance of a general normative conception, the court identifies broad similarities between the case before it and a range of decided cases. Reflecting on those cases, again under the guidance of that general conception, the court is led to articulate a rule that captures the legal duties and relationships recognized in those cases. This may involve extending and adjusting the rule the court might have articulated were it not for the pressure of the case before it. Second, the court applies the rule thus articulated to the instant case, deciding either that it has the relevant features identified as relevant by the rule and so falls under it or lacks them and so cannot be justified by reference to that rule and the analogues it identifies.

Brewer refines Lord Diplock’s account in two respects.⁴⁵ He identifies three stages rather than two (subdividing Diplock’s first stage) and recasts the process of the first stage in terms of abduction rather than induction. Thus, at the first substage, reasoners identify (by abduction) the “analogy-warranting rule” implicit in the range of decided cases presented to them. At the second stage they assess that rule in light of possibly competing “analogy-warranting rationales” that might serve to justify the rule. This process of confirmation or disconfirmation may call for adjustment or rejection of the initially proposed analogy-warranting rule; a revised or new rule is proposed and assessed until a rule is discovered that can actually justify treating the cases as relevantly similar. Once a rule is settled upon, reasoners move to the final stage in which the confirmed rule is applied to the case *sub judice*. As Brewer sees it, although rules are essential to this process, analogical reasoning is not reducible to deductive

⁴⁴ *Home Office v. Dorset Yacht Co. Ltd.*, [1970] AC 1004, 1058–60.

⁴⁵ Brewer, *Exemplary Reasoning*, 109 *Harvard Law Review* at 962–3.

reasoning, but neither is it *sui generis* or “mystical.” Analogical judgments are subject to a familiar, if somewhat complex, rational discipline, and analogical reasoning is “a patterned sequence of distinct reasoning processes.”⁴⁶ Still, he admits that the initial process of abduction relies on an “inevitably and uncodifiable imaginative moment.”⁴⁷

Brewer’s account is a “modest” and unskeptical rule-rationalism because it insists on the importance and rational credibility of the abductive moment. Brewer parts company with skeptics in thinking that the initiative of analogical reasoning lies in rational process of abducting rules from cases that thereby prove to be analogues. However, Brewer’s modest rule-rationalist position is unstable. If he accepts the argument for rule-rationalism from relevance and its implications, then he must concede that the abductive moment is trivial. For, no great exercise of thought or imagination, no special discriminatory powers, are necessary to come up with candidate rules for consideration at the evaluative stage. The relevance argument implies that the cases have *no* significance apart from the rules that *make* their shared properties normatively significant. So, all the work in establishing which cases are analogous to which, and in what respects, is done at the evaluative stage by analogy-warranting rationales – that is, by the “theories.” Even when a proposed rule is disconfirmed, and reasoners are required to rethink the matter, they look only to *another rule*. The cases do not, and in view of the relevance argument cannot, exert any independent pressure. But, then, Brewer’s account collapses into the skepticism he sought to avoid. He can avoid that skepticism only by reassessing his commitment to the relevance argument and its alleged implications. That is to say, if something intellectually important happens at the “abductive” stage, that is reason to reject the view that the relevance criteria are constitutively and normatively prior. This opens the door to further thought about what happens at that stage. While Brewer characterizes it as abduction, I shall offer an alternative explanation that resists his three-stage picture. But first I want to shed some skeptical light on rule-rationalist skepticism of analogical reasoning.

C. Rule, Judgment, and the Untenability of Rule-Rationalism

Skeptics take the relevance argument to support the constitutive, normative, and epistemological priority of rules over their instances, and hence the necessity of rules for analogical reasoning. Consider first the claim of epistemic priority – that is, the view that nothing can *serve* as an example unless some rule *is used* to pick out the features that make it exemplary. Of course, if the claim is that someone seeking to follow the example must have ready to hand an explicitly formulated rule, it is manifestly false. Much of our lives, from a very early age,

⁴⁶ Brewer, *Exemplary Reasoning*, 109 Harvard Law Review at 954.

⁴⁷ Brewer, *Exemplary Reasoning*, 109 Harvard Law Review at 954.

are rule-guided, but rarely do we appeal to explicit rules. Indeed, we would be hard pressed to make explicit the rules that allegedly guide us.

There are various ways to avoid this initial defect, but the epistemic priority thesis faces a second and deeper problem, noted by Kant, Lewis Carroll, and many others.⁴⁸ The rule-rationalist argues that it is not possible to judge one case relevantly similar to another without the guidance of a rule that brings them under some category or description: We can judge them relevantly similar just in case they are instances of the same rule or concept. However, in fact the opposite is true. It is possible to identify something as an instance of the rule or concept only if one judges that it is relevantly similar to cases already falling under the rule, and that is possible only if at some point it is possible to judge cases as relevantly similar without appeal to a mediating rule. If every such judgment presupposed a rule to guide it, we would be caught in an infinite regress. Here is the general form of the argument: No application of an explicit rule to a particular case, no application of a concept, is possible without the exercise of what Kant called the power of judgment, a power that defies explicit articulation. If we insist that judgment is legitimate (rationally guided) only in virtue of one's grasp of a bridging rule, then we face the same problem with respect to application of the bridging rule. It requires in turn an exercise of judgment, which, if the judgment's legitimacy depends solely on a rule to guide it, posits another rule that in turn requires a further exercise of judgment, and so forth. If every exercise of judgment requires a rule, then not only is judgment impossible, but so too are rules and reasoning. The demand for a rule to bridge all such gaps runs us immediately into a vicious infinite regress. It is precisely this demand – the Tortoise's mantra – which drove Lewis Carroll's Achilles into despair.

Thus, there cannot be a *rule*, a genuine guide for thought or action, unless at some point there is a *nonrulish*, albeit normatively responsible, exercise of judgment. But the same capacity relied on for applying rules and concepts is involved in following examples – that is, in identifying something as an example and recognizing another case as its analogue. The rule-rationalist argues that it is possible to recognize one case as the analogue of another only through recognizing a rule, and thus analogical reasoning is necessarily enthymematic. But this rule-rationalist dogma now can be seen to be just a special case of the incoherent demand of the Tortoise. We cannot accept that analogical reasoning necessarily involves an enthymeme without starting the engines of a vicious regress.

⁴⁸ Immanuel Kant, *Critique of Pure Reason* (St. Martin's Press, 1965), A132–3/B171–2; Lewis Carroll, *What the Tortoise Said to Achilles*, 4 Mind 278, 278–80 (1895). See also Robert B. Brandom, *Making It Explicit: Reasoning, Representing, and Discursive Commitment* (Harvard University Press, 1994), ch. 1 and Robert B. Brandom, *Articulating Reasons: An Introduction to Inferentialism* (Harvard University Press, 2000), 52–4, 87–9.

The rule-rationalist's constitutive and normative theses now look vulnerable as well. We have already noted that these theses do not follow from the relevance argument, and now we see that we must abandon the idea that any exercise of judgment of the kind involved in applying rules and analogical reasoning is necessarily enthymematic. It is not clear what further reason we have for clinging to rule-rationalist dogma, and there is good reason to reject it. First, the normative or justificatory thesis seems to rest on deduction as the paradigm of justificatory reasoning. But this confuses deductive argument with sound reasoning. Following the rules of deduction, one might be able to show that A entails B, but, of course, this truth commits no one to the truth of B, and it may be sheer madness to embrace B, or even seriously entertain it. Niels Bohr is reported to have chided his fellow physicists who trusted purely formal or mathematical arguments: "No, no, you're not thinking; you're just being logical."⁴⁹ Thinking or sound reasoning critically considers the premises of a valid argument in light of the conclusions that logically follow from them and further arguments and reasons that bear on them, and judges what to believe on an assessment of the whole. The output of sound reasoning is the product of this assessment of all the relevant considerations in light of their logical relations. Justification cannot with any plausibility be modeled as a strictly top-down matter.

Second, the top-down model fails in particular as a characterization of analogical reasoning. For in such reasoning the cases and relations among them exert an influence over the rules or principles that might be articulated to capture their significance, just as attempts to articulate the reasons in play in reasoning from one case to another can influence what we take the relevant similarities to be. Dworkin claims that analogy without theory is blind, but typically the reverse is at least equally true.⁵⁰ That is, in analogical reasoning in law, there is no absolute priority of cases to general propositions or vice versa.

This is especially problematic for rule-rationalists who, like Dworkin, tend to favor principles over rules as the necessary analogy-making factors. Principles differ from rules in many ways, perhaps, but just two differences draw our attention here: (1) Principles have, but rules lack, a dimension of practical or moral weight; and (2) principles are by their nature open-ended. Neither of these features provides ways of escaping the infinite regress and might even bring it on more quickly. The dimension of weight is irrelevant to present considerations, because it is a matter of the practical force of a standard relative to competitors, but determining how to take a given case as an example is a matter of determining the *scope* of a general proposition, not its force relative

⁴⁹ Howard Margolis, *Patterns, Thinking, and Cognition: A Theory of Judgment* (University of Chicago Press, 1987), 1.

⁵⁰ Francis M. Kamm, *Theory and Analogy in Law*, 29 *Arizona State Law Journal* 405, 414 (1997).

to competing standards. Similarly, if principles are open-ended in the sense that they can be overridden on certain circumstances by other principles, the issue of the scope of the principle has not been addressed, only its relative weight. Alternatively, we can think of the open-endedness as a matter of general normative propositions incorporating something like a *ceteris paribus* clause. But we can no longer claim normative or constitutive priority for principles so understood, for principles cannot tell us when cases are “*paribus*” or not; that is the job of the cases. We might best see *ceteris paribus* principles simply as works in progress,⁵¹ working approximations of rules that might do the job. But that view is consistent with the classical conception of analogical reasoning in law. If this route is taken, the sting of rule-rationalist skepticism has been pulled.

I conclude that rule-rationalism’s skepticism about analogical reasoning in law is unwarranted, but the classical conception is still in need of defense. The time has come to turn to the task of offering a constructive account of this mode of thinking and reasoning.

IV. Analogical Thinking in Law

A. Two Levels

I have argued that both particularism and rule-rationalism fail to explain the nature and role of analogical reasoning in law. Among the reasons for their failure is the fact that both attempts fail to recognize fully the complexity of analogical thinking in law. Particularism made no room for the influence of broader principled constraints on analogical reasoning, while rule-rationalism could not countenance a form of reasoning that does not depend immediately on rules or principles. The first step toward a more adequate account is to distinguish two levels of analogical thinking in law and to recognize their interdependence. I call the base level *analogical reasoning*. At this level, credible analogies are identified and inferences are made based on them. Beyond this is a reflective level involving *analogy assessment*. At this level, analogical inferences and judgments are evaluated in light of wider legal (and possibly moral) principles. Although analogical thinking in law *may* proceed sequentially through these levels, we should not think of these as stages through which all analogical thinking must pass but as different yet interdependent kinds of reasoning that can, sometimes, go on nearly simultaneously. However, sometimes, also, legal reasoners may feel no need to take up the second-level task, and some of

⁵¹ For discussion of this way of thinking of *ceteris paribus* laws in the natural sciences, see John Earman and John Roberts, *Ceteris Paribus, There Is No Problem of Provisos*, 118 *Synthese* 439, 465–6, 470–2 (1999).

these times they may be right. In these cases, for all practical purposes the legal reasoner's job is done when analogical reasoning yields up its increase.

There are, then, two respects in which my two-level account differs from Brewer's three-stage account. First, my account of the nature of analogical reasoning (that is, base-level analogical thinking) differs significantly from his. This should be clear presently. Second, on the account I will defend, analogical reasoning and analogy assessment are interdependent; they work in partnership. Reflection at the analogy-assessment level focuses on deliverances from the base level, deliverances that come to the reflective level with prejudice (albeit defeasible) in their favor. At the same time, the principles and concerns operative at the assessment level shape the context in which analogical reasoning operates, and they underwrite structural constraints on it. In contrast, on Brewer's account, his second, "confirmation," stage dominates the process of exemplary reasoning as long as he embraces the relevance argument. I discuss the interdependence of these two levels below, but we must first explain the nature of base-level analogical reasoning.

B. Base-Level Analogical Thinking

Analogical reasoning is not unique to law; indeed, there is growing awareness among cognitive scientists that analogical reasoning lies at the heart of human cognition.⁵² Analogical reasoning in common law practice is a distinctive, institutionalized form of this basic cognitive activity. Before turning to its special features, I want to consider briefly some features of analogical reasoning in general.

Analogical reasoning is a dynamic process of discursive analogy formation – that is, of forming judgments of robust relevance of similarities and differences and drawing inferences from these judgments. Let me elaborate this summary characterization of analogical reasoning. I begin with two preliminary points. First, analogical reasoning is not a form of argument, like *modus ponens* or *reductio ad absurdum*, but rather it is a dynamic mode of reasoning that relies on, and builds on, competencies and protocols of thought basic to cognition. In law, this reasoning is best characterized not as a form of argument (formal argument structure) but as a complex *mode of argumentation*. Second, while rules are not necessary, context is. Analogy formation is not a matter of applying a rule to an instance but rather of fitting something into its place in an intelligible, sense-making context, like fitting a piece into a jigsaw puzzle.⁵³

⁵² See, e.g., Dedre Gentner, Keith J. Holyoak and Boicho N. Kokinov, eds., *The Analogical Mind: Perspectives from Cognitive Science* (MIT Press, 2001); Keith J. Holyoak and Paul Thagard, *Mental Leaps: Analogy in Creative Thought* (MIT Press, 1995).

⁵³ The context-relativity of judgments of relevance is a central theme of Dan Sperber and Deidre Wilson's very helpful book *Relevance: Communication and Cognition* (Harvard University Press, 1986), 118–42. The importance of context for analogy formation is nicely

Analogy formation is a species of pattern recognition. But it is not merely a disposition to respond differentially to environmental stimuli in regular ways; rather, it is a form of thinking, a process of intellection, that plays in many modes ranging from getting a joke to jazz improvisation, from recognizing a friend's brother to grasping a concept, from writing a poem to arguing a contested legal case, and beyond. All varieties require certain cognitive resources and competences, although they vary widely in their sophistication and articulateness. These resources and competences include focus, frame, contrast, consilience, and revision. Analogy formation requires focus, the knack of ignoring some details and attending to others. Focus is the product of the one's cognitive frame. Frame is constituted by the cognizer's sense of the point of seeking out the pattern or analogy, and accompanying constraints on this search. Together they trigger certain experience-based dispositions to look for certain things and to ignore others.⁵⁴ Frame and focus suggest a context of comparables.

Working in this context, cognizers refine their grasp of the object of their attention with two tools, two fundamental competences: contrast and consilience. Contrast is essential to cognition. No philosopher understood this better, or exploited it more profoundly, than Hegel, but the basic point is as familiar as it is fundamental. To grasp something meaningful is to recognize its boundaries or determinacy. This presupposes a context in which it can be distinguished. The context cannot just be some background of indeterminate light; it must be populated by other relatively determinate and contrasting elements — the sharper their outlines, the more determinate will be its features. Contrast also often takes the form of discrepancy or conflict. Discrepancy is the most basic spur to cognitive integration and consilience. Integration requires finding a basis for distinguishing those elements in the frame that are truly different, and accounting for that difference, and uniting those elements that can be woven into a fabric of consonance.

Finally, we should note that the cognizer's progress toward grasping a pattern or analogy is not linear, but cyclical and dynamic, involving proposals, evaluations, revision, and new proposals leading eventually (often instantaneously, of course) to some degree of equilibrium. The jigsaw puzzle image, then, is misleading, for the pieces we fit into contexts of meaning are not wholly pre-cut, and neither are the places into which they must fit. Fitting and shaping involve mutual adjustment.

illustrated by a study by Amos Tversky, *Features of Similarity*, 84 *Psychological Review* 327 (1977). Subjects, asked which country is most similar to Austria, were presented with two groups: (1) Sweden, Hungary, Poland, and (2) Sweden, Hungary, Norway. Presented with group (1), people tended to choose Sweden, but from group (2) they chose Hungary. It is fair to conclude that there was a strong "context effect" on the formation of analogies. My thesis goes further; I maintain that context is essential to the formation of analogies.

⁵⁴ Margolis calls these dispositions "priming" and "inhibiting." See *Patterns, Thinking, and Cognition*, 28.

When cognitive scientists model the process of analogical thinking they distinguish four components of the process: encoding, retrieval, mapping, and evaluation.⁵⁵ Initially the target analogue is encoded: Salient features are identified (cues are taken in), then a search for source analogues is undertaken (retrieval). A profile of the target analogue, albeit tentative and revisable, is needed to guide the retrieval search. Retrieval is aided both by the initial encoding and by the fact that the memory tends to be organized into *topoi*-headed “files.”⁵⁶ Both processes are highly influenced by context, especially by the analogizer’s sense of the point of the search for analogy and the context of its use. Once source analogue candidates are retrieved, features of the source are mapped to target features, and the results are evaluated for closeness of fit (relative to the constraints of the context). Evaluations confirm the analogy, reject it, or force further retrieval and mapping. The initial encoding and retrieval processes yield a context of comparables, finding judgments of threshold relevance of similarities and differences. These are then tested in the mapping and evaluation stages, which can call for revisions and refinement in a dynamic process. Eventually, in equilibrium judgments of robust relevance and analogical inference are formed.

This model is helpful as far as it goes, but it leaves out of the picture one crucial feature of analogical reasoning: It involves making and assessing *judgments* of relevance and conclusions drawn from them. This entails two further, essential dimensions of the process not fully captured in the above model.⁵⁷ First, the reasoning process by which judgments are formed is necessarily normative. (This is not to say that it necessarily addresses matters of action or policy – the normative is not restricted to the practical domain.) The root thought here is the fundamental Kantian idea that judging is an activity for which judges are, and take themselves to be, responsible. When they engage in analogical reasoning, judges do not merely respond – regularly, reliably – to their environment, but rather their responses manifest proprieties in their practice. Discrepancies are regarded as mistakes, not anomalies. In making judgments, judges vouch for the correctness of their judgments. Of course, the correctness of their judgments cannot be constituted by their commitment to them; for then no distinction between their seeming to be correct and their being so could be made, and without that no mistakes would be possible, and

⁵⁵ Different accounts divide the process in slightly different ways, but they tend to include at least these elements. See, e.g., Holyoak and Thagard, *Mental Leaps*, 15, 103–37; Thomas C. Eschridge, “A Hybrid Model of Continuous Analogical Reasoning” in Keith J. Holyoak and John A. Barnden, eds., *Analogical Connections: Advances in Connectionist and Neural Computation Theory* (Ablex, 1994).

⁵⁶ Mark T. Keane, *Analogical Problem Solving* (Halsted Press, 1988), 56ff.

⁵⁷ The thoughts in the remainder of this subsection draw on themes deep in Kant and Hegel. The specific shape I give them here follows the discussion of Robert B. Brandom in his *Articulating Reasons* and *Making It Explicit* (especially chs. 1 and 9).

without the possibility of mistake, the normative idea of correctness loses its content. Thus, in vouching for correctness of their judgments, judges make themselves liable to challenge. Demands for the grounds of their judgments, for the reasons for their so judging, are in order. Thus, judgments stand in need of reasons and are capable of functioning as reasons for other judgments, and judges are regarded and regard themselves as beings capable of giving, requesting, and being challenged to give reasons. This fact has an important impact on the process of analogy formation: For beings of this kind, analogical formation is a process of fitting responses into a network of reasons used to justify beliefs, claims, and decisions. That is to say, analogy formation for them is an essentially discursive process. The context essential to analogy formation is a discursive network. This is the second essential dimension of the process of analogical reasoning.

Thus, the context within which analogical reasoning works is not merely a set of objects or instances but a network of instances linked by inferential relations, of reasons supporting, refining, elaborating other reasons, and being supported, restricted, or elaborated by yet others. The process of analogical reasoning involves identifying the appropriate context for the case at hand (compare: “encoding” and “retrieval”) and then locating that case in its inferential web (the discursive form of “mapping” and “evaluation”). This effort of locating a target analogue in its context of comparables utilizes the indispensable tools of contrast and consilience, which here take on a distinctively discursive character. They trace compatibilities and incompatibilities of judgments and reasons for them, drawing connections that make sense and distinguishing cases that are incompatible; they work out implications and determine whether they can stand together with other commitments in the network. All this occurs in a dynamic process working toward a sense-making equilibrium. Only through tracing these reason-constituting, judgment-supporting connections and contrasts is the content of a particular analogue established. To understand its normative significance, its meaning as an example, does not necessarily involve grasping some general proposition of which it is an instance, but it does essentially involve having a sound (if limited) sense of its location in this network of reasons and the ability (within limits) to work out its implications. Moreover, this network responds dynamically to the addition of new cases; hence, it is never fixed for long. In sum, to grasp something as an example is to locate it in such a network and to appreciate its contribution to the dynamic movement occurring within the network.

Theoretical accounts of analogical reasoning have typically relied on a certain misleading picture of the process in view. According to this picture of *argument from analogy*, analogical reasoning proceeds in two steps. First, relevant similarities between proposed source and target analogues are observed, and then an inference is drawn from something further known about the

source analogue to something antecedently unknown about the target analogue. Particularist and rule-rationalist theories share this picture, differing only over the manner in which the initial similarities are established. But this picture is misleading. Strictly speaking, there is no such thing as *argument from analogy*, but only *reasoning with analogy*, or rather *analogical reasoning*. (Of course, as I said previously, while analogical reasoning is not a *form of argument*, it is a *mode of argumentation*.) Analogical reasoning is not a linear process but rather a dynamic one of locating a new case in a network of inferences; reasoning – tracing compatibilities and incompatibilities of reasons and inferences – occurs throughout the process. If we understand it in this way, we can resist the temptation to reduce it either to a form of intuition or of mere rule application.

To judge the (robust) relevance of certain features of a case is not to report the deliverance of some kind of special ineffable insight, intuition, or perception. It is, rather, to endorse a judgment the content of which is given by its location in the web of reasons that support it and that it supports. To articulate the content of a judgment of robust relevance is to show its place in the network of reasons – that is, it is to offer further reasons and arguments. Claims of the truth or correctness of such judgments are properly discharged, and can be discharged only, discursively. Of course, one may try to make explicit the connections and reasons one endorses and exploits, and doing so may take the form of articulating a general rule or principle (or set of them). But this will always be parasitic on the more fundamental activity of grasping the connections and distinctions. As Robert Brandom puts it, to articulate such rules is to try to say what it is we are *doing*,⁵⁸ but it is the doing, the mastery of the inferential network, that is constitutively prior. In view of the dynamic and open nature of the process of analogical reasoning, no formulation of a rule can hope to achieve anything more than a useful approximation, for some stretch of time, of the practical significance of the cases in view. Moreover, a thinker making use of any explicit formulation of a rule to decide a new issue must rely on the mastery of the same inferential network that the rule was meant to make explicit. The content and normative significance of rules, as the content of examples, is fixed by this network.

This is not to deny that trying to make the products of our analogical reasoning explicit is an important task. Doing so subjects them to critical reflection from a different quarter that can correct and refine our analogical reasoning. In law, this is the task of analogy-assessment, second-level analogical thinking. It is an essential part of the process of analogical thinking in law, but it is important to keep in mind that this reflective, critical activity presupposes the independent rational integrity of the analogical reasoning process.

⁵⁸ Brandom, *Articulating Reasons*, 8.

C. Analogical Reasoning in Law: The Process

In law we find a special institutionalized practice of analogical reasoning. Because of its specific subject matter, social role, and institutionalized form, it has some distinctive features; yet, it has all the defining features we have identified thus far. The elements of context, frame, and focus are neatly captured by Karl Llewellyn:

[N]o case can have meaning by itself. Standing alone it gives you no guidance . . . as to how far it carries, as to how much of its language will hold water later. What counts, what gives you leads, what give you sureness, . . . is the background of the other cases in relation to which you must read the one. They color the language, the technical terms, used in the opinion. But above all they give you the wherewithal to find which of the facts are significant, and in what aspect they are significant, and how far the rules laid down are to be trusted.⁵⁹

Llewellyn's point holds for all reasoning in common law, but especially for that which involves trying to understand the scope and impact of a common law decision. Analogical reasoning, which seeks to determine the significance of a decision *taken as an example*, begins with setting the given case in its legal, decisional context, and from there it seeks to work out its practical meaning. This requires both encoding of the given case and retrieval of other arguably related cases. In order to encode the given case, it is necessary to have some sense of the legal domain into which it falls, and the narrative of the facts must be given some familiar shape. This often happens naturally, almost automatically, for trained lawyers and judges, who are, as Llewellyn put it, "law-conditioned," seeing "significances through law-spectacles."⁶⁰ Encoded cases trigger retrieval of a set of roughly similar cases, establishing a context of comparables. But of course, as Llewellyn's comment makes clear, we might just as accurately say that the context of comparables alerts the judge or lawyer (or student of law) to the pattern of significant facts in the case at hand. These intellectual processes cannot be separated; they are highly interdependent and move in a cyclical rather than linear fashion.

Moreover, in the very process of identifying this context of comparables, the distinctive tools of analogical reasoning, contrast and consonance, are already in use. Once the context has been established, these tools become even more important. The legal reasoner's task is to explore connections and differences, the reasons supporting treating the case at hand as akin to certain members of the context of comparables, the reasons blocking treating them as akin to others, and implications of each. In law this inquiry is typically structured as an

⁵⁹ Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana Publishing, 1960), 48.

⁶⁰ Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown and Co., 1960), 19.

exploration of competing analogies. Through this competition the case at hand is located in its appropriate inferential network of claims, reasons, judgments, and decisions. In time, a pattern takes shape that makes sense of treating some of the cases in the same way; an intelligible guide for action emerges. The cases fall into a class of like cases because the kind of reasons they provide for judicial decisions, and for actions of officials and of citizens seeking to comply with the law, hang together in a way that makes practical, legal sense. The aim, as Chapman puts it, is to make sure that

all the reasons within some doctrinal area of like cases bear a rational relationship to one another. The point is not merely that the final legal conclusion “just looks right,” but rather that all the reasons behind that conclusion look right because they are rationally related to the reasons for other like cases, that is, they form an integrated or coherent whole in which all these other reasons participate as parts.⁶¹

It is important to note that the rational pressure which gives shape to the emerging sense of the likeness of these cases comes from *all* members of the initial rough comparison class: cases judged similar to the instant case, cases judged dissimilar and “distinguished” in the process, and the instant case itself. The construction of the class of like cases is the result of a kind of triangulation among these focal points. Clearly the emerging analogous precedent cases exert influence on the way the instant case is to be understood, but lawyers are keenly aware that distinguishing is no less important to the process. Distinguishing presupposes some degree of (threshold) relevant similarity; distinguished cases are members of the initial rough comparison class. In virtue of this initial relevance, they present a challenge to the deliberator and exert pressure on the shape of the class of “like cases.” Their legal force must be acknowledged, and its deflection must be explained. In like manner, the present case exerts its share of pressure. It can urge reconsideration of received views of the salience or importance of facts of previous cases and thereby of the reasons on which their decisions rest. This is one reason why common lawyers like to say that rules of law can change as they are applied, that the common law is a “moving classification system.”⁶² It is also among the reasons why they regard explicit judicial formulations of rules as corrigible and vulnerable to revision upon further assessment of decided cases and reasons for them. Rules, when they can be formulated, are the product of this process of reasoning, not its precondition, and they are always answerable to the cases. At the same time, they and the particular conclusions of analogical reasoning are also answerable to more general, principled concerns that are raised at the level of reflective assessment.

⁶¹ Chapman, *The Rational and the Reasonable*, 61 *University of Chicago Law Review* at 75ff.

⁶² Edward Levi, *The Nature of Judicial Reasoning*, 32 *University of Chicago Law Review* 395, 403 (1965); See also Levi, *An Introduction to Legal Reasoning*, 3–4.

As described here, this process appears elaborate and complex, but like many cognitive processes it is often truncated in some parts, elaborated in others. The process is typically greatly truncated in published judicial opinions. This is not surprising, for not only are judicial opinions subject to the conventions of their genre, they are also only a part, the publicly most visible, of the institutionalized process of analogical thinking in law. That process does not go on merely in a judge's head (or chambers); it is institutionalized in the workings of a public forum. In the course of deciding one case, many parties contribute to it. For example, lawyers do much of the work by which the context of comparables is established before a case comes to court, and this context is refined in the pleadings. Argument in court, *inter alia*, enacts forensically the competition of analogies and exploration of the implications of focusing on similarities with some cases and distinguishing other cases. Published judicial opinions are likely to provide only a formulaic report of this process of reasoning, at best. Yet, from time to time, we get a glimpse into the actual working of this process. A very concise glimpse is available in Justice Cardozo's opinion in *Hynes*, especially if it is read together with the opinions of Putnam (majority) and Jaycox (dissenting) of the Appellate Division below.⁶³ A more detailed and complex example can be found in the majority opinion by Justice White and dissenting opinion by Justice Harlan in *United States v. White*.⁶⁴ This case is far too complex to describe here, but a close study of these opinions, issuing from very different judicial styles, will provide a vivid illustration of the process of analogical reasoning typical of common law practice.

D. Analogical Reasoning in Law: Constraints

Like all analogical reasoning, the practice of analogical reasoning in law is shaped and constrained in important ways by its context. I will mention here five pervasive constraints. First, analogical reasoning in law is reasoning in aid of *practical* deliberation with a specific purpose shaped by its institutional context. It serves a specific practical purpose that includes vindication or justification of official decisions and guiding of actions of officials and citizens alike. We look to analogical reasoning to provide justifications for legal decisions. And because such justifications must be public, the process and protocol of deliberation in which they are formed must also be public. In addition, the reasoning must yield decisions that are able to guide the actions of ordinary citizens. Thus, the class of like cases uncovered by the process of analogical reasoning must not

⁶³ *Hynes*, 231 N.Y. at 231–6, 131 N.E. at 898–900; *Hynes v. New York Central Railroad Co.*, 188 A.D. 178, 176 N.Y.S. 795 (2d Dept. 1919).

⁶⁴ 401 U.S. 745 (1971). For a helpful discussion, see James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press, 1990), ch. 7.

only be interesting, suggestive, or evocative, as an apt metaphor might be, but it must also be practically intelligible, first of all to the decision maker but more important to those who are expected to follow it. That is, it must project an intelligible pattern that can be followed by the community at large. Thus, the pattern identified by analogical reasoning must make practical sense to those who are expected to follow it and to those expected to accept its application as vindication of decisions based on it.

Second, the discipline of common law makes this public practical reasoning *historical* by anchoring deliberation and justification of decisions and actions to past decisions and actions of the community.⁶⁵ These past decisions and actions are typically actions of institutions or officials of government acting on behalf of the community as its agent, but they may also be actions of citizens when they can be understood as carrying normative significance for the wider community of which they are members. For the most part, legal and judicial decision making is anchored in past official decisions and actions, especially those recorded in books of court opinions. This set of past decisions and actions represents the stock or “memory” from which analogy-candidates are retrieved, but also the categories and *topoi* in terms of which cases presently before a court are characterized. It is within the web of normative connections into which time and the practice of legal reasoning has woven these decisions that particular cases before the court take on meaning as examples. The “pointillist world of common-law decisions”⁶⁶ is fundamentally historical. Analogical reasoning stands like Janus at the threshold between the past and the future, charged with grounding a decision in the case at hand by looking both backward to the field of examples from which we have come and forward to a projected path into the future. It looks to the past not only for help, guidance, and lively suggestions but also for normative direction, for commitments that have implications for decisions for cases at hand and for actions and decisions in the future. This is not merely an aspiration; it is also a significant constraint on common law analogical reasoning.

The third constraint lies in the public and collaborative nature of analogical reasoning in law. We can identify two related constraints here. First, although it is only individuals who participate in analogical reasoning, these individuals proceed as members of a group, participants in a social practice: and even when the reasoning is carried on, as it were, in their own heads, it is an interior version of an essentially exterior, interpersonal, public enterprise. They deliberate, as Hart put it, not for their own part only,⁶⁷ but as members of a larger whole. The

⁶⁵ For a discussion of the historical dimension of law, see Gerald J. Postema, *Melody and Law's Mindfulness of Time*, 17 Ratio Juris 203 (2004).

⁶⁶ Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, 1993), 183.

⁶⁷ H. L. A. Hart, *The Concept of Law* (2nd ed.) (Oxford University Press, 1994), 116.

normative significance of a case, its “gravitational force,”⁶⁸ lies not in what one particular judge lays down but in what is taken up in the community of judges and beyond. The doctrine of dictum ensures that no individual judge’s decision is *ipso facto* authoritative beyond the particular case before her. Second, this practice of practical reasoning is institutionalized as the *modus operandi* of a public forum. Legal reasoning is argument shaped by this public forum. This is evident, for example, in the structuring of argument by presenting competing analogies. This fact is not merely incidental to the nature of the reasoning process; it decisively determines its nature.

The fourth constraint lies in the substantive law itself. Typically, cases come to a court for determination already located (defeasibly, perhaps) in a relatively narrow substantive domain of law (the domain of negligence in tort, for example, or employment discrimination, or commercial sale of goods). The initial encoding of the case, through pleading, establishes the local domain. This domain consists of not only a vast array of recorded decisions but also a set of broadly defined values or standards that the law in those cases, is thought reasonably to serve. Lord Diplock wrote that the judge “must know what he is looking for” when locating the instant case, in the domain of decided cases and “this involves approaching his analysis with some general conception of conduct and relationships which ought to give rise to a duty of care.”⁶⁹

E. Analogy and the Sense of Justice

The final constraint consists in the fact that analogical reasoning in law operates *sub specii iustitiae*; that is, it is guided by a sense of concrete justice. Levi articulates the structuring question of analogical reasoning in law as follows: “When will it be just to treat different cases as though they were the same?”⁷⁰ The sense of justice at work here is familiar, but difficult to characterize. Recent philosophers almost universally dismiss it, but I think they have been too hasty. To understand this constraint on analogical reasoning in law, we must answer two questions. What is the notion of justice at work here? And why think it is at work in ordinary analogical reasoning in law? Consider the latter question first.

Whenever judges or lawyers are pressed to explain the driving force of analogy, they invoke the idea of treating like cases alike and elaborate it in terms of “fairness,” “equity,” or “justice in the administration of law.” No doubt this is often just pious dinner-speech rhetoric, but it also reflects an important demand of the rule of law. We demand justice of our basic social and political

⁶⁸ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), 111–3.

⁶⁹ Lord Diplock in *Dorset Yacht*, [1970] AC at 1058–9.

⁷⁰ Levi, *An Introduction to Legal Reasoning*, 3.

institutions, but we are also aware that in modern conditions we disagree deeply about what justice requires. The rule of law constrains the exercise of political power to the aspiration of serving justice where justice is widely disputed. It cannot credibly promise that justice will be done, but it does demand that all who are bound to administer the law aspire to that goal,⁷¹ and hence, that they frame their decision making within the parameters defined by the notion of justice. This aspiration governs and gives shape to discursive analogy seeking in the law.

However, persuasive analogical reasoning is no guarantee that the decision to which it leads is just. Indeed, if we are to understand the sense of justice at work in analogical reasoning in law we must acknowledge the logical space between the normative meaning of an example and its ultimate legal and moral justification.⁷² There are two reasons for acknowledging this logical space. First, in many cases it is possible to determine what following or extending a precedent involves and yet to wonder intelligibly whether following it is justified in light of the larger purposes of the law or morality. These questions of justification are raised at the level of reflective analogy assessment. The sense of justice we now have in view, however, constrains work at the initial analogy-determining level; it constrains and guides the search for “like cases.” Second, convictions of injustice made from a wider perspective do not always undermine judgments of appropriateness of analogies at the more concrete level. This is not because determining analogies is without guidance from a sense of justice, but only that the latter sense is to some degree independent of certain broader principles of justice. Considerations of street-level justice sometimes retain their moral force (or some degree of it) despite weighty moral objections to the larger institution they inevitably serve. It is not the case that all justice-regarding bets are off when we are forced to act under unjust institutions. Justice considerations are remarkably resilient. We need careful moral insight to distinguish cases in which this is truly the case from cases in which the fruit of the poisoned tree is equally poisoned. The sense of justice at work in analogical reasoning in law is among the resources funding this moral insight.

How are we to characterize this sense of justice? Unfortunately, attempts to capture it have been caught in an unproductive dialectic between two equally unsatisfactory explanations of the core notion of treating like cases alike. The first claims that (a kind of) justice lies in simple consistency or uniformity of treatment. Treating like cases alike is just simply in virtue of the fact that the cases and the treatment are alike *in some respect or other*. Sometimes such

⁷¹ Jeremy Waldron, *Does Law Promise Justice?*, 17 Georgia State University Law Review 759 (2001).

⁷² Barbara Baum Levenbook, *The Meaning of a Precedent*, 6 Legal Theory 185, 192–6 (2000).

actions are said to be “formally just,” because, it is argued, treating like cases is the form shared by all, even widely differing, substantive principles of justice.⁷³ Alternatively, some argue that, if justice is at work in analogical reasoning, it must be in service of some specific principle of justice. On this view, treating like cases alike is just precisely when a correct principle of justice determines what cases and treatment are relevantly alike and people are treated as that principle requires. Of course, understood in this way, the requirement to treat like cases alike adds nothing to the principle of justice and is silent in its absence. It is an empty principle.⁷⁴

The former view is clearly unacceptable. Uniformity of behavior is not necessarily just: Some is uniformly unjust and some is neither just nor unjust. Uniformity in plumbing, prayer, or pastry baking, for example, will never be praised for its justice; and torture and lynching should never be so dignified regardless of how uniform they are. The problem is deeper: Treating like cases alike, construed in this way, is not merely indeterminate, it is indiscriminate; hence, necessarily, it is not a kind of justice. For, if anything definite can be said about justice, it can be said that justice is morally discriminate – it distinguishes, it leads us away from some courses of action and in the direction of others – but “formal justice” is utterly indiscriminate and thus not a form of justice. This undermines the formal justice understanding of the sense of justice we have in view, but it does not show the sense of justice to be bankrupt. The alternative understanding presses the challenge against that idea itself. But the second characterization of the sense of justice here in view is no more satisfactory than its dialectical counterpart. It is blind to the role that the sense of justice plays in analogical reasoning. It is precisely where there is no clear principle of justice at hand, where the task is to work out what justice requires, that the sense of justice comes into play. Analogical reasoning operates *sub speciei iustitiae*, but not necessarily through the lens of some specific principle of justice. The sense of justice provides a discriminatory frame; it orients rather than determines judgment.

Hart suggested that we understand “justice in the administration of law” as a matter of judging “without prejudice, interest, or caprice.”⁷⁵ He understands justice of this sort as impartiality. This sets us in the right direction, I think, but it focuses too narrowly on the attitude of the judge and ignores the shaping of the judgment. Yet the mode and valence are right: It rules out certain considerations or influences on deliberation. What is characteristically at work in concrete analogical reasoning in law is not a determinate sense of

⁷³ H. L. A. Hart may have made such an argument, or so David Lyons suggests; see David Lyons, *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* (Cambridge University Press, 1993), 28–30 (discussing Hart, *The Concept of Law* (1st ed.), 155–7).

⁷⁴ Peter Westen, *The Empty Idea of Equality*, 95 Harvard Law Review 537 (1982).

⁷⁵ Hart, *The Concept of Law*, 161.

justice but a sense of *manifest injustice in concrete circumstances*. All these features – the concreteness, the manifestness, and the negativity – are central to this street-level sense of justice. What orients deliberation is the sense that certain similarities or dissimilarities are excluded, that certain directions in which the analogy might be taken are ruled out, judged inappropriate, or unfair. “[O]n many occasions,” Avishai Margalit writes, “we recognize what is wrong with something without having a clear idea, or any idea at all, about what is right with it.”⁷⁶ Working out what is right or just is an important task, for which our sense of manifest injustice gives some direction, but it is rarely a simple matter of taking the negation of what we can confidently judge to be unjust. In some cases, excluding options that would work manifest injustice leaves more than one salient set of similarities and dissimilarities unchallenged without deciding among them. In other cases, this juridical *via negativa* excludes all but one publicly viable set of similarities and dissimilarities, but even then the judge may not be in a position to articulate what it is that makes that set right.

Two examples illustrate this sense of justice at work. First, consider Viscount Simonds’s speech in *The Wagon Mound (No. 1)*.⁷⁷ Simonds argues against the *In re Polemis*⁷⁸ rule that a defendant is liable for all “directly” caused damage flowing from a negligent act regardless of whether it was foreseeable and for limitation of liability to damage that was of a type that, given the negligent conduct, was reasonably foreseeable:

Their Lordships have already observed that to hold B liable for consequences however unforeseeable of a careless act, if, but only if, he is at the same time liable for some other damage however trivial, appears neither logical nor just. This becomes more clear if it is supposed that similar unforeseeable damage is suffered by A and C but other foreseeable damage, for which B is liable, by only A. A system of law which would hold B liable to A but not to C for the similar damage suffered by each of them could not easily be defended.⁷⁹

Simonds’s hypothetical case points out an inconsistency, but the appearance of inconsistency is rooted in a concrete sense of injustice, a sense of the difficulty of finding a plausible frame of argument that could satisfy our sense of justice in the assumed case.

Second, in *Navagazione*,⁸⁰ the defendant caused damage to the plaintiff’s ship, requiring that it be docked for repair. The defendant sought to escape liability for costs of docking because other repairs, which would have necessitated

⁷⁶ Avishai Margalit, *The Ethics of Memory* (Harvard University Press, 2002), 113.

⁷⁷ *Overseas Tankship (U. K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)*, [1961] AC 388 (Privy Council, Australia).

⁷⁸ *Re Polemis and Furness, Withy & Co., Ltd.*, [1921] All ER 40, [1921] 3 KB 560.

⁷⁹ *Wagon Mound*, [1961] AC at 435.

⁸⁰ *Navigazione Libera Triestina Societa Anonima v. Newtown Creek Towing Co.*, 98 F.2d 694 (2d Cir. 1938) (Hand, J.).

docking the ship, were done at the same time. Normally, the plaintiff is required to prove that the defendant caused all the damage for which recovery is sought, and where there are joint tortfeasors, the plaintiff must prove how much of the damage was caused by each tortfeasor. However, Judge Learned Hand argued that to follow this analogy in this case would lead to an “absurd result” because, as it was impossible for the plaintiff to prove what portion of the cost of docking was due to the actions of the defendant, a proven tortfeasor would be able to escape all liability and an innocent party would be left with the loss. An alternative analogy proved more attractive. Where two causal factors contribute to the damage suffered by the plaintiff, but only one is due to the actionable fault of the defendant, courts shift the burden of proof to the defendant to “unravel the casuistries resulting from his wrong.” The tortfeasor is not permitted “to escape through the meshes of a logical net.”⁸¹ Judge Hand’s street-level sense of justice rejected the standard joint tortfeasor analogy and directed him to a more reasonable alternative.

V. Analogical Thinking in Law: The Reflective Assessment Level

In law, analogical thinking is not restricted to base-level analogical reasoning; it also includes a critical, reflective level of analogy assessment. Justice Cardozo called analogical reasoning (“the method of philosophy”) “the organon of the courts,” but he quickly added that this method is tested and checked by justice as justice is checked by analogical reasoning.⁸² We must explore, if only briefly, some salient features of this level of analogical thinking.

Analogical reasoning sometimes yields an understanding sufficient to ground a decision in the present case that is consonant with precedent and fit to guide future decisions and actions. But success is not guaranteed. It may only be able to narrow the range of alternatives for dealing with the problem facing the court. Judges and lawyers can move to the assessment level whenever they engage in analogical thinking in law, but it is especially when the appeal to analogy fails to yield a determinate or fully satisfactory result that they feel compelled to do so. Even so, disputes on common law matters that compel consideration at the reflective assessment level are still shaped by reasoning carried on at the base level. Analogical reasoning may reach an impasse, but repair to the broader perspective works with the materials fashioned at the previous stage of the process. By the same token, the constraints on analogical reasoning, especially the values giving shape to local domains of law and the street-level sense of justice, are always vulnerable to reflective assessment from a somewhat longer distance.

⁸¹ *Navigazione*, 98 F.2d at 697.

⁸² Cardozo, *The Nature of the Judicial Process*, 35, 44.

Common law deliberation is driven, or at least encouraged, to ascend to the reflective level by a sense that the understanding achieved by means of base-level analogical reasoning is problematic in some way. Broadly speaking, the cognitive discomfort is likely to arise from one or both of two quarters. One might come to sense that, although the proposed pattern fits well with its closest neighbor, it is out of phase with the law when one casts a broader eye over it. The pattern of like cases that emerges, while coherent and intelligible on its block, may not fit comfortably in the larger legal neighborhood, let alone the municipality as a whole. So, rules or patterns that seem to emerge from initial assessments of similarity and difference are subject to reflective critical assessment. Judges seek to identify patterns in past cases, Levi writes, while “attempting to see the law as a fairly consistent whole.”⁸³ We might call this the *systemic coherence* filter. Reflection of this kind tends to work both at the level of specific cases and at the level of relatively more general doctrine or principle. If the doctrine to which a line of cases contributes fits ill with other legal doctrines in cognate areas, and there is no structural or jurisdictional reason to accept the dissonance as the price of respect for some larger legal or constitutional principle, then there may be pressure to look again for a different pattern in the specific cases in question, a pattern that might also fit them reasonably well and relieve the systemic dissonance.

It is, of course, a familiar and hotly disputed question whether, and to what extent, the assessment of such coherence can proceed without relying on the moral sensibilities of the judge (or other parties) engaged in analogical thinking at this level. This leads me to the second possible source of discomfort with the result of base-level analogical thinking. We may be troubled with the pattern suggested by analogical reasoning largely for reasons of political morality. It may strike us as unjust or morally untenable from a moral perspective. One might be unhappy with it because the decision and its cognate cases are inconsistent with some more general principle that may be both implicit in the law and is attractive on independent moral grounds, like that of equal treatment. Analogical reasoning, focused narrowly, may leave us blind to certain forms of inequality or injury that are morally significant but that have not received recognition in the local legal domain in which we happen to be working.

The methodology of reflective assessment most frequently used in common law practice has much in common with Dworkin’s “interpretive” account of legal reasoning.⁸⁴ Briefly stated, the methodology requires that the deliberator seek that set of general principles which makes the best overall sense of law, such that the principles not only imply the more specific rules or decisions under review but, if possible, also show them to be justified. Alternative principles or theories are ranked according to the extent to which they “fit” the legal data and

⁸³ Levi, *An Introduction to Legal Reasoning*, 3.

⁸⁴ Ronald Dworkin, *Law’s Empire* (Harvard University Press, 1986), chs. 2, 3 and 7.

“appeal” from a moral point of view. “Integrity” holds the principles of the theory close to the practice they underwrite, while simultaneously keeping its eye on justice, to which it aspires. There is much to be said for this characterization of this process as an account of an important part of common law reasoning, but it is constrained in important ways. I will mention here just one salient constraint that naturally follows from matters we have already considered.

The basic pragmatism of common law thinking significantly reins in the urge to achieve broad systematic or global coherence and tends to favor relatively local coherence. We have noted that the pressure to proceed to the reflective assessment level is fundamentally practical, not theoretical. It comes not from the felt need to present a comprehensive, theoretically coherent, and complete account of the law but rather from the need to resolve problems or tensions that arise from concrete contexts of social life and litigation. It may not arise at all from incompatibilities at certain levels of abstraction. The practical success of law depends on the social capacities of citizens and the extent to which law’s guidance is accessible to these capacities. But these capacities are more likely to function well with relatively concrete matters where practical pressures for conciliation are present and recognizably common materials are ready to hand. At more abstract levels, not only are the practical pressures weaker, but also the materials are likely to be more contested, less manifestly common, and hence less suitable for the purpose. Thus, while inevitably there will be pressures on parties engaged in analogical thinking in law to move to the level of reflective assessment, the focus even there is likely to be more local than global. This is not to deny that it is possible for pressures toward resolving relatively comprehensive theoretical incompatibilities to arise. Where they do arise, global reflective consideration alone may suffice and we can only hope there are resources sufficient to the task. But these pressures are not always present and may well be relatively rare.

Typically, analogical thinking in law is more concerned with workability on the ground than with coherence of broad moral vision. It cannot tolerate blatant incoherence of a result with other fundamental parts of the law if it tends to undermine the legitimacy of the law, but it is tolerant of incompleteness of vision and a system that falls short of global coherence. It is more concerned with coherence of legal doctrine with the activities, practices, and lives of the citizens whose interactions it seeks to guide than with more distant theoretical coherence of legal doctrine. The reason for this is obvious: It is from the former that pressures toward conciliation and practical coherence arise. Analogical thinking in law is willing to sacrifice a degree of theoretical coherence for substantial resonance of the law in the community it serves. Hence, while there is pressure at the reflective stage to achieve systemic and moral coherence, even this part of analogical thinking tends toward relatively local rather than more global coherence, coherence of practice rather than of theory.

VI. Conclusion

I have elaborated and defended what I take to be the classical conception of the practice of analogical reasoning in common law. I have not tried to remain faithful to every detail of orthodoxy with respect to this conception – if there is any such orthodoxy at this point in time – but I have tried to capture and offer a rationale for what I take to be its guiding spirit. I have sought to avoid the extremes of particularism and rule-rationalism, while incorporating into my account features of those views that seemed to ring true. To do so, it was necessary to distinguish two interdependent levels of analogical thinking in law, base-level analogical reasoning and analogy assessment at a more general, critical level. Analogical reasoning in law, I argued, is best understood as an institutionalized form of a dynamic process of discursive analogy formation. To grasp a judicial decision as an example is to locate it in an inferential network of mutually supporting judgments. These judgments are oriented and constrained by features of the deliberative context distinctive of common law practice, most notably its practical, historical, and public dimensions and a robust sense of justice. The methodology of reflective assessment makes room for, indeed greatly depends on, more broadly principled and theoretical concerns that skeptics find missing at the base level. Analogical thinking in law is not anti-theoretical, but neither does it regard all case-based argument as reducible to construction and deployment of general justifying principle or theory. Each has a role to play. Each has its own sphere of operation; each depends in part on the other.

Reasoned Decisions and Legal Theory

DAVID DYZENHAUS AND MICHAEL TAGGART

In dealing with the antinomy of reason and fiat, the main effort of the various schools of legal philosophy has been to obliterate one of its branches.

Lon L. Fuller¹

[T]he historical study of legal institutions may have more to offer to . . . [the] . . . solution [of the problems of legal theory] than has yet been appreciated.

A. W. Brian Simpson²

The common law tradition claims not only that the law is reason but also that the reason of the law is morally good. Judges' reasons for decision, their judgments, are considered within this tradition to be evidence for this claim, for the way in which the common law "works itself pure." Philosophers of law who work in common law jurisdictions have taken one of three approaches to this claim.

First, there are philosophers who have tried to make sense of the common law through an argument that in attending to the way that judges interpret the law, we will not only best understand law but also discern the connection between law and morality. We will call such philosophers, without any pejorative intent, common law romantics. Most notable among them is Ronald Dworkin.

Second, philosophers have argued that the common law is a mess – in Jeremy Bentham's words, a "shapeless heap of odds and ends."³ Such a mess, Bentham argued, leads to uncertainty about the law that not only is contrary to the demands of utility but permits "Judge & Co." to arrogate power that properly belongs to the legislature. As a legal positivist, Bentham prized legal

¹ *Reason and Fiat in Case Law*, 59 Harvard Law Review 376, 381 (1946). An earlier version of this paper was given as a lecture and appears in *The Benjamin N. Cardozo Memorial Lectures Delivered Before the Association of the Bar of the City of New York 1941–1970* (Matthew Bender, 1971), 31.

² *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, 1987), ix.

³ *The Works of Jeremy Bentham* (vol. 4) (John Bowring, ed.) (William Tait, 1838–43), 459.

certainty above all else, and so he ultimately argued for ridding legal order of the common law.

Bentham's legal positivism is political in that his concept of law is constructed in the cause of his understanding of how best to design political and legal order. Thus he and Dworkin can be understood as arguing for or against the common law on political grounds, on grounds about the best way to construct legal order.

The last approach purports to be conceptual, not political, to be simply in the business of unpacking the concept of law – the concept that is at work wherever law is to be found. This approach was first developed by H.L.A. Hart in the 1950s and 1960s and is adopted by the school of thought we will refer to as conceptual legal positivism, in order to distinguish it from Bentham's political theory of law.

Conceptual legal positivists do not accept the claim of the common law tradition. The way they conceptualize law requires them to describe what common law judges do when they decide hard cases as quasi-legislation – the exercise of a discretion unconstrained by law. So while the common law tradition says that judges' conclusions about what the law requires are in the hardest of cases fully determined by law as long as judges reason appropriately, conceptual legal positivists hold that in most, perhaps all, cases that come before the courts on points of law, judges have to decide the cases in accordance with their sense of what's best.⁴ But because their theory is conceptual, not political, conceptual legal positivists are content to let matters rest with this re-description. They do not advocate either getting rid of or retaining the common law.⁵ Indeed, they seem supremely indifferent to how the common law works or the common lawyers' view of how it works.

We will come back to these approaches toward the end of this chapter, for we want to discuss them against the backdrop of a rather surprising omission. It is almost an assumption in the philosophical debate about the common law that judges are under a duty to give reasons for their decisions. But as a matter of history, this assumption has hardly ever been the case. It is still not the case in many common law jurisdictions today, although, as we will see, the law is beginning to recognize such a duty, at least in some situations.

For common law romantics, reason-giving is so essential a component of their picture of law that they seem to have assumed that there is a duty to give reasons. Their idealized picture of legal practice is substituted for actual practice and its problems. And conceptual positivists do not regard reasons as anything

⁴ See H. L. A. Hart, "Positivism and the Separation of Law and Morals" in H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983), 49, 62–72.

⁵ There are of course variations on these three approaches, notably legal realism and incorporationist legal positivism. These will be discussed briefly in notes below.

more than the expression of a judge's personal views about what law is best to make. So they are as unconcerned with reasons for decision as they are with the reasons legislators may have for enacting a law.

In contrast, Bentham paid serious attention to the interrelated issues of reason-giving – publicity and precedent. In his early work Bentham did not advocate getting rid of the common law because he held out the hope that it could be reformed. He thus flirted with a strict notion of *stare decisis*, one that would secure public expectations by holding judges strictly to what had been done in the past.⁶ And he ridiculed the judges for threatening with contempt those hardy law reporters who presumed to publish reports of cases without judicial license.⁷ He favored law reporting along rational lines so that the law would be “knowable” and the “light of the Law” would shine everywhere.⁸ So Bentham supported, against the common law tradition, a duty to give reasons for the sake of publicity.

In Bentham's legal theory, publicity is perhaps the most important value of the rule of law, because only if the law is entirely public can it provide a secure basis for individuals' expectations about how the law will respond to their behavior. Even in his later work, where he argued that the common law should be abolished, he still seemed to want reasons for judgment published and widely distributed for publicity's sake. In addition, it was an important part of some of his schemes that judges report their views on contested matters of interpretation via law officers to a legislative committee with power to initiate law reform.⁹ In short, for Bentham it is a requirement of the rule of law that judges be under a duty to give reasons.

Bentham took this stance because, unusually for a legal philosopher, he was very attentive to problems that arise within legal practice.¹⁰ While he is one of the founders of legal positivism, perhaps the founder, legal philosophy for

⁶ Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford University Press, 1986), 193–7.

⁷ Jeremy Bentham, *A Comment on the Commentaries and a Fragment on Government* (J. H. Burns and H. L. A. Hart, eds.) (Athlone Press, 1977), 193, 214.

⁸ See Roderick Munday, *Bentham, Bacon and the Movement for the Reform of English Law Reporting*, 4 *Utilitas* 299, 303, 308 (1992) (for the quotations from Bentham's unpublished papers). See generally David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge University Press, 1989), ch. 12.

⁹ Bowring, *The Works of Jeremy Bentham* (vol. 9), 502–4.

¹⁰ It is not coincidental that almost alone among contemporary legal philosophers it is another positivist, Fred Schauer, who has recognized that judicial failure to give reasons is more prevalent than is assumed by the “conventional picture of legal decision-making, with the appellate opinion as its archetype and ‘reasoned elaboration’ its credo.” Frederick Schauer, *Giving Reasons*, 47 *Stanford Law Review* 633, 633 (1995). For, in our view, Schauer is not a conceptual legal positivist because like Bentham he seems to regard legal positivism as the most fruitful way of responding to problems that arise in legal practice. It is also no coincidence that Schauer's understanding of the role of reasons is similar to Bentham's: Reasons can give judgments a more rule-like quality of generality, thus enabling a doctrine of precedent that can secure certainty.

him was not a parlor game of concepts but the most productive response he could come up with to real problems of the practice of law. Moreover, he was concerned with solving such problems not in order to make the life of the practitioners of law easier but to make law serve best the interests of all those individuals who found themselves subject to it.

In this sense, our chapter is written in the spirit of Bentham's understanding of legal theory, even though we will ultimately reject his version of it – his legal positivism. So we will start by explaining why the common law did not require judges to give factually supported and reasoned decisions, and we will then reflect on how and why that is changing, and what that tells us about law. That will provide us with a basis to ask what these legal developments tell us both about the different philosophical approaches to the common law in general and in particular their neglect of practice.

I. No Legal Obligation on Judges to Give Reasoned Decisions

It is incontrovertible that the common law did not require, as a matter of legally enforceable obligation, judges of any type to give factually supported and reasoned decisions in any type of case. There is not even a common law requirement that decisions be in writing.¹¹ On the occasions when court rules, statutes, and even constitutions required written reasons,¹² the courts jealously guarded the freedom to give unreasoned decisions.¹³ Nevertheless, the law in the books did not accurately reflect the law in action. For much of the past 800 years or so, common law judges in appellate courts¹⁴ did usually give reasons, and these were often written down by reporters and published in unofficial law reports. It may be that an explicit legal duty to give reasons was considered unnecessary because the judges did so by convention.¹⁵ This does not explain, of course, the reluctance to impose a legally enforceable duty when convention failed.

¹¹ Michael Akehurst, *Statement of Reasons for Judicial and Administrative Decisions*, 33 *Modern Law Review* 154 (1970).

¹² On the U.S. position, see Max Radin, *The Requirement of Written Opinions*, 18 *California Law Review* 486 (1930); Erwin C. Surrency, *A History of American Law Publishing* (Oceana Publications, 1990), 40–3; Philip Shuchman, "The Writing and Reporting of Judicial Opinions" in Shimon Shetreet, ed., *The Role of Courts in Society* (Martinus Nijhoff, 1988), 319. See also E. S. Nwauche, *An Appraisal of the Constitutional Provision for the Delivery of Judgments in Nigeria*, 27 *Commonwealth Law Bulletin* 1278 (2001); *Cedeno v. Logan*, [2001] 1 WLR 86 (Privy Council, Trinidad and Tobago).

¹³ See, e.g., *Nana Osei Assibey III v. Nana Kwasi Agyeman*, [1952] 2 All ER 1084 (Privy Council, West Africa); *Taylor v. McKeithen*, 407 U.S. 191, 195–96 (1980) (Rehnquist, J.); *Houston v. Williams*, 13 Cal. 24, 26 (1859).

¹⁴ We use the term very loosely, projecting back in time a concept that did not then exist in its modern form.

¹⁵ Paul Robertshaw, *Providing Reasons for Administrative Decisions*, 27 *Anglo-American Law Review* 29, 30 (1998).

II. Records, Reports, and Reasons

The development of court records goes back to an early stage of English legal history. Originally, the “record” was regarded as what took place before the judges, and not the writing.¹⁶ The record or account was initially given orally, but by the thirteenth century writing prevailed over memory and the written record became sacrosanct and conclusive. The principal purpose of the record “was to establish what had been decided, so that the decision might be final: what later lawyers would call estoppel by judgment or *res judicata*.”¹⁷ Known as “Plea Rolls,” these records, written in Latin (until 1732) on sheepskin, recorded the formal steps in the litigation and in some instances the bare decision or verdict.¹⁸ Most important for our present purpose is what was not recorded: The judges’ reasons and authorities relied upon, if any, formed no part of the record.¹⁹

The activity of what we call today law reporting was established by the end of the thirteenth century. Probably for educative purposes, various anonymous contributors recorded in law French the significant argument and reasoning in many cases in what became known as the “Year Books.”²⁰ These reports, however, recorded oral debate and did not identify the case by name or the reporter’s name, nor did they usually record the result.²¹ These were not law reports as we think of them today. The Year Books came to an abrupt end in 1535²² and were followed after a lull by numerous privately reported and published law reports under the names of identified reporters. It was in the

¹⁶ See Jack K. Weber, *The Power of Judicial Records*, 9 *Journal of Legal History* 180, 181 (1988).

¹⁷ John H. Baker, “Records, Reports and the Origins of Case-Law in England” in John H. Baker, ed., *Judicial Records, Law Reports and the Growth of Case Law* (Duncker & Humblot, 1989), 15, 16.

¹⁸ Baker, “Records, Reports and the Origins of Case-Law in England” in Baker, *Judicial Records*, 16–17. Baker says that the “final disposition” was recorded only “in a small proportion of cases.” *Id.* at 34. This is because either the case was discontinued or settled or the victorious party did not need to pay the fee for recording the verdict on the roll in order to enforce the judgment: David J. Ibbetson, “Report and Record in Early-Modern Common Law” in Alain Wijffels, ed., *Case Law in the Making: The Techniques and Methods of Judicial Records and Law Reports* (vol. 1) (Duncker & Humblot, 1997), 55, 56.

¹⁹ Baker, “Records, Reports and the Origins of Case-Law in England” in Baker, *Judicial Records*, 17.

²⁰ Baker, “Records, Reports and the Origins of Case-Law in England” in Baker, *Judicial Records*, 18–21. At this time the judicial reasoning was simply argument by judges trying to convince the others of the correctness of their position. See A. W. B. Simpson, “The Survival of the Common Law System” in *Then and Now 1799–1974: Commemorating 175 Years of Law Bookselling and Publishing* (Sweet & Maxwell, 1974), 51, 69 (“Matters are aggravated in the common law system by the continuance of the tradition of the individual ‘judgment’ or judicial opinion, whose rambling and undisciplined style derives from its origins in an argument intended to persuade the other judges, such arguments having by a curious evolution got into the wrong place. They are now delivered too late to serve the function for which their style suits them.”).

²¹ Baker, “Records, Reports and the Origins of Case-Law in England” in Baker, *Judicial Records*, 35.

²² L. W. Abbott, *Law Reporting in England 1485–1585* (Athlone Press, 1973), 35–6.

privately published reports of Edmund Plowden in the 1570s that something recognizable as the modern law report first emerged. We see the beginning of case authority displacing reason,²³ a process that evolved over the next 300 years into a doctrine of precedent.²⁴

One reason put forward to explain the barren nature of the record is the omnipresence of jury trial. Until the middle of the nineteenth century every criminal and civil case in the common law courts was tried before a jury. It was only with the advent of the judge-alone civil trial after 1854 that reasoned judgments began to appear at first instance in the superior common law courts, a few years after it was permitted in the newly established county courts.²⁵ Before that occurred, all we had were jury directions on the law, and the legal skirmishing pre-trial in order to sort out the issues to go to the jury.²⁶ Indeed, that preliminary argument was grist to the law reporters' mills for centuries. In less than a century and a half the civil jury is almost extinct outside the United States of America, and even there it is in serious decline.²⁷ For the first time and very late in the development of the common law, judgments dealt with factual issues – in contrast to the jury verdict, which never disclosed the particular facts as found – and legal questions, which were previously transmuted into assertive, focused, and unvarnished jury directions. That legal learning disappeared into “the black box” that is the jury. The jury gives no reasons; indeed their reasoning is “suppressed.”²⁸ As Justice Michael Kirby observed of judge-alone trials:

What could once be left safely to the sphinx-like jury must now be attempted by the first instance judge. He or she must find facts, record any relevant findings on credibility and provide at least sufficient exposition of the applicable law to permit a disappointed

²³ Ibbetson, “Report and Record in Early-Modern Common Law” in Wijffels, *Case Law in the Making*, 63.

²⁴ See John Philip Dawson, *The Oracles of the Law* (University of Michigan Press, 1968), 50–99; Gerald J. Postema, “Roots of Our Notion of Precedent” in Laurence Goldstein, ed., *Precedent in Law* (Oxford University Press, 1987); Jim Evans, “Change in the Doctrine of Precedent During the Nineteenth Century” in Goldstein, *Precedent in Law*.

²⁵ See Patrick Polden, *A History of the County Court, 1846–1971* (Cambridge University Press, 1999), 46–7.

²⁶ See David Millon, *Positivism in the Historiography of the Common Law*, Wisconsin Law Review 669 (1989).

²⁷ See generally Simpson, “The Survival of the Common Law System” in *Then and Now*, 66–8; Valerie P. Hans and Neil Vidmar, “Jurors and Juries” in Austin Sarat, ed., *The Blackwell Companion to Law and Society* (Blackwell, 2004), 207–8. On the position in the United States, see generally Ellen E. Sward, *Decline of the Civil Jury* (Carolina Academic Press, 2001).

²⁸ Simpson, “The Survival of the Common Law System” in *Then and Now*, 65. The law prohibits in various ways both the contemporaneous and subsequent giving of reasons or explanation by jurors. For an overview of Anglo-Commonwealth law see M. McHugh, “Jurors’ Deliberations, Jury Secrecy, Public Policy and the Law of Contempt” in Mark Findlay and Peter Duff, eds., *The Jury Under Attack* (Butterworths, 1988), 56; Joseph Jaconelli, *Open Justice: Reappraising the Public Trial* (Oxford University Press, 2002), ch. 7.

litigant to consider and if so advised, exercise any rights of appeal for which the law provides.²⁹

The rise of the reasoned first-instance judgment in Britain marks a significant turning point in the history of the common law.³⁰ Allied to this was the emergence in England after 1875 of an effective means of centralized appeal, which in the long run made “the first instance judges more careful, [and] more determined to render their judgments appeal-proof.”³¹ As we will now show, this history explains important features of the common law system.

III. Some Important Features of the Common Law System

First, the judgment – the holding, decision, or verdict – was separate and distinct from the reasoning and reasons (if any given). The authority of the judgment, strictly speaking, comes from the fact of decision by the judge, rather than from the reasons. It is fundamental to the court process that the judge declare a result in every concluded case. The one thing a judge cannot do is to declare a draw. Furthermore, when a result is reached, the law of *res judicata* forecloses reexamination of the case, irrespective of whether reasons accompany the decision. And, finally, an appeal is lodged against the result or formal judgment (the most canonical feature of the common law judgment) and not from the reasons (if any) given by the judge. This recognizes that the reasoning may be wrong but the result correct nonetheless. Hence, the emphasis on reaching a result – on resolving the dispute at hand by authoritative decision – rather than on reasoned elaboration is deeply engrained in the common law.

Second, as reasons were not automatically part of the record, any errors of law evident in the reasons were not discloseable on the record and hence were not correctible by prerogative writ.³² Even when reasons were volunteered by an inferior court or decision maker, these did not automatically become part of the “record” that might be sent up to a superior court when demanded.³³ Only

²⁹ Michael Kirby, *On the Writing of Judgments*, 64 Australian Law Journal 691, 692 (1990). See also Sir Harry Gibbs, *Judgment Writing*, 67 Australian Law Journal 494, 497 (1993).

³⁰ See S. F. C. Milsom, *The Past and the Future of Judge-made Law*, 8 Monash University Law Review 1, 10–11 (1982), reprinted in S. F. C. Milsom, *Studies in the History of the Common Law* (Hambleton Press, 1985), 209.

³¹ S. Hedley, “Words, Words, Words: Making Sense of Legal Judgments, 1875–1940” in Chantal Stebbings, ed., *Law Reporting in Britain: Proceedings of the Eleventh British Legal History Conference* (Hambleton Press, 1995), 169, 184 (italics deleted).

³² J. W. Bridge, “The Duty to Give Reasons as an Aspect of Natural Justice” in Dominik Lasok, A. J. Jaffey, D. L. Perrott, and C. Sachs, eds., *Fundamental Duties: A Volume of Essays by Present and Former Members of the Law Faculty of the University of Exeter to Commemorate the Silver Jubilee of the University* (Pergamon Press, 1980), 81, 85.

³³ See generally A. S. Abel, *Materials Proper for Consideration in Certiorari to Tribunals: I*, 15 University of Toronto Law Journal 102 (1963–4) (the anticipated second part of this article never appeared).

if the decision maker both volunteered reasons and deliberately attached them to the record could the superior court receive and scrutinize the record. But as there was no duty for inferior courts to give reasons (or, as we will see below, on lesser inferior bodies), this seldom occurred.

Third, any report of a case vouched for by a barrister could be cited in court.³⁴ It was not necessary that the decision be reported in a published series of reports.³⁵ For a very long time in the history of the common law, judgments were delivered orally and were selectively reported.³⁶ There were no official law reports.³⁷ Publication of a decision did not matter. The fact that a judge decided it was enough, and the barristerial imprimatur was simply to vouch for authenticity. Bentham protested against this to no avail.³⁸

Fourth, the prevalent conception of the common law was as “a system of customary law, that is, as a body of traditional ideas received within a caste of lawyers.”³⁹ It was ignorant or worse to speak of judicial legislation: One could not mistake the authoritative determination of a dispute for the act of legislating.⁴⁰ As Gerald Postema said of the classical common law:

While common lawyers recognized statutory law and other “constitutions” issuing from the monarch or monarch-in-Parliament, still the law in its fundament was understood to be not so much “made” or “posited” – something “laid down” by will or nature – but rather, something “taken up,” that is, used by judges and others in subsequent practical deliberation. . . . Of course, one could describe a given portion of common law in terms of rules, maxims or principles, but it would be beside the point to ask, “who made them?” According to common lawyers, law lived in and evolved from the practical interactions

³⁴ Sir William S. Holdsworth, “Law Reporting in the Nineteenth and Twentieth Centuries” in Sir William S. Holdsworth, *Essays in Law and History* (Arthur L. Goodhart and Harold Greville Hanbury, eds.) (Oxford University Press, 1946), 284.

³⁵ In England and Wales there have never been any “official” law reports in that all reports have been and continue to be produced by private enterprise. See Roderick Munday, *The ‘Official’ Law Reports*, 165 *Justice of the Peace* 162, 164 (2001).

³⁶ F. H. Lawson, *Comparative Judicial Style*, 25 *American Journal of Comparative Law* 364, 364–5 (1977). Roderick Munday discusses the significance of the very rapid change in the United Kingdom to a written mode of judgment in *Judicial Configurations: Permutations of the Court and Properties of Judgment*, 61 *Cambridge Law Journal* 612, 614 (2002).

³⁷ The long-held view that the Year Books were the work product of reporters paid by the Crown has been demolished. See F. W. Maitland, *Year Books 1 & 2 Edward II*; (vol. 17) (Selden Society, 1903), xi–xiii; Baker, “Records, Reports and the Origins of Case-Law in England” in Baker, *Judicial Records*, 23–5. See also note 35.

³⁸ Bowring, *The Works of Jeremy Bentham* (vol. 10), 78; Munday, *Bentham, Bacon and the Movement for the Reform of English Law Reporting*, 4 *Utilitas* at 304.

³⁹ A. W. B. Simpson, “The Common Law and Legal Theory” in A. W. B. Simpson, ed., *Oxford Essays in Jurisprudence (Second Series)* (Oxford University Press, 1973), 77, 80, reprinted in A. W. B. Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon, 1987). See also Martin Krygier, *Law as Tradition*, 5 *Law & Philosophy* 237, 245 (1986).

⁴⁰ Simpson, “The Common Law and Legal Theory” in Simpson, *Oxford Essays in Jurisprudence (Second Series)*, 86.

of daily life as they surfaced in the common law courts. Its existence was evidenced in its use.⁴¹

This can be seen in the different treatment of statute law and reasons for decision in terms of copyright protection. The Crown had the sole and exclusive right to print certain books and documents (called “prerogative copies”): described by Chitty as the Crown’s “exclusive right to publish religious or civil constitutions – in a word, to promulgate every ordinance by which the subject is to live, and be governed.”⁴² This included Acts of Parliament, but not reasons for decision or judgments.⁴³ In a 1781 case, Lord Skinner C. B. explained the origin of the monarch’s exclusive right to publish Acts of Parliament as follows:

There are traces of the ancient mode of promulgating the ordinances of the state yet remaining to us, suited to the gloominess of the times when few who heard them could have read them; the king’s officers transmitted authentic copies of them to the sheriffs, who caused them to be publicly read in their county court. When the demand for authentic copies began to increase, and when the introduction of printing facilitated the multiplication of copies, the people were supplied with copies of the king’s command by his patentee. This seemed a very obvious and reasonable extent of that duty which lay upon the crown to furnish the people with the authentic text of their ordinances.⁴⁴

This rationale did not extend to the other *primary* source of law – the common law.⁴⁵ The common law was not conceived of as canonically formulated, discrete rules of law, displayable on posts in the market square.⁴⁶

⁴¹ Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 Oxford University Commonwealth Law Journal 155, 166–7 (2002).

⁴² Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (Butterworths, 1820), 238.

⁴³ This view is taken by Michael Taggart, *Copyright in Written Reasons for Judgment*, 10 Sydney Law Review 319 (1984); Colin Tapper, *Genius and Janus: Information Technology and the Law*, 11 Melbourne University Law Review 75 (1985); Mark Perry, *Judges’ Reasons for Judgments – To Whom Do They Belong?*, 18 New Zealand Universities Law Review 257 (1998); David Vaver, *Copyright and the State in Canada and the United States*, 10 Intellectual Property Law Journal 187 (1996). Contrary views are discussed therein. The law developed differently (and much more straightforwardly) in the United States.

⁴⁴ *Eyre and Strahan v. Carman*, (Exch. 1781), reported only in *Bacon’s Abridgement* (vol. 6) (7th ed.) (A. Strahan, 1832), 509, 511.

This account brings to mind the oft-told story about the cruel Roman emperor Caligula (nickname for Gaius Julius Caesar Germanicus, A.D. 12–41), who is reputed to have displayed the appropriately promulgated “laws” on posts so high that the populace could not read them. This story has been relied on by scholars as diverse in view as Bentham and Lon Fuller. See Burns and Hart, *A Comment on the Commentaries*, 214; Lon L. Fuller, *The Morality of Law* (revised ed.) (Yale University Press, 1969), 93.

⁴⁵ Of course, for Bentham this was a sign of the common law’s inadequacy. It was “a cruelty greater than Caligula’s . . . Our Judges hang not up *theirs* [laws] at all . . .” Burns and Hart, *A Comment on the Commentaries*, 214 (emphasis in original).

⁴⁶ Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 Oxford University Commonwealth Law Journal 1, 14 (2003).

IV. Administrative Law

All of these interlocking pieces of the common law puzzle were in place by the time something recognizable as the administrative state started to emerge in the sixteenth century.⁴⁷ As the judges, by way of prerogative writs, began to supervise the various bodies authorized to administer law and discharge public responsibilities, they projected their own best practice onto these decision makers who decided matters similar to those the courts decided. As the law did not require reasons of the judges, the judges did not think to impose that requirement on inferior courts and other decision makers.⁴⁸ It remained that way for several centuries and did not change until the past thirty years or so.⁴⁹

Of course, while the legal position was the same for all public decision makers – neither superior court judges nor inferior courts, administrative tribunals, or civil servants were required to give reasons – the practice was different. As we know, the appellate courts habitually gave reasons from the later part of the nineteenth century onward, but that was not the practice of administrative tribunals. It appears that reasons were not routinely given by civil servants or by the increasing number of tribunals. Indeed, one of the recommendations of the Donoughmore Committee in 1932 was that reasons should be given for quasi-judicial decisions.⁵⁰ This recommendation was not taken up and it took another committee of inquiry twenty-five years later to reiterate the recommendation before a widely applicable statutory duty to give reasoned decisions upon request was introduced into U.K. law.⁵¹

One intuition in this arrested development of the common law the British love of the amateur and the innate sense of justice of the English gentleman.⁵² Recall Lord Mansfield's (in)famous advice to a colonial governor in 1790: "Consider what you think justice requires, and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly

⁴⁷ See Edith G. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Centuries* (Harvard University Press, 1963), ch. 1.

⁴⁸ *The King v. Inhabitants of Ripon*, (1733) 2 W. Kel. 295, 25 Eng. Rep. 623 ("there is no Necessity [on the part of justices] for setting out the Reason of their Judgment: We never do it in this Court . . .").

⁴⁹ Michael Kirby, "Accountability and the Right to Reasons" in Michael Taggart, ed., *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1986), 36, 37. This was the longstanding view of Sir William Wade. See H. W. R. Wade, *Statutory Tribunal's Duty to Give Reasons*, 79 Law Quarterly Review 344, 346 (1963).

⁵⁰ *Committee on Ministers' Powers Report*, 76, 80, 100 (Cmnd. 4060) (Her Majesty's Stationery Office, 1932). See D. G. T. Williams, *The Donoughmore Report in Retrospect*, 60 Public Administration 273 (1982).

⁵¹ Stanley A. de Smith, H. Woolf, and Jeffrey Jowell, *Judicial Review of Administrative Action* (5th ed.) (Sweet & Maxwell, 1995), § 9–043.

⁵² The sexism is intentional.

be wrong.”⁵³ This notion that giving no reasons or explanation was the “safe course”⁵⁴ caught on among administrative decision makers. What Lord Sumner called the inscrutability of the sphinx became the norm.⁵⁵

In the twentieth century, considerable pressure built up to change the law so as to require reasons of administrative decision makers, and there was statutory reform followed by common law developments to that effect. The U.S. Administrative Procedure Act 1946 led the way,⁵⁶ followed by the U.K. Tribunals and Inquiries Act 1958 and wide-ranging statutory duties in Canada, Australasia, and New Zealand from the 1970s onward.⁵⁷ The gaps not covered by general or specific statutory reasons requirements are increasingly filled by common law developments driven by procedural fairness and the modern trend toward accountability and transparency.

The *modus operandi* in the administrative sphere has been to utilize procedural fairness to require reasons in ill-defined exceptional circumstances⁵⁸ and then a gradual expansion of those exceptions, so they will eventually swallow the rule.⁵⁹ In 1999, the Supreme Court of Canada broke new ground by announcing a general common law duty to give reasons on administrative decision makers.⁶⁰ In the U.K., the continuing process of Europeanization has introduced reasons requirements from European Union law and the body of case law interpreting the

⁵³ John Campbell, *Lives of the Lord Chancellors and Keepers of the Great Seal of England* (vol. 1) (1st ed.) (John Murray, 1845), 248.

⁵⁴ *Schmidt v. Secretary of State for Home Affairs*, [1969] 2 Ch. 149, 172 (Widgery, C. J.).

⁵⁵ *R. v. Nat Bell Liquors, Ltd.*, [1922] 2 AC 128, 159 (Privy Council, Canada) (Lord Sumner) (“the inscrutable face of the sphinx”).

⁵⁶ For overviews, see Clark Byse, *Requirements of Findings and Reasons in Formal Proceedings in Administrative Law*, 26 *American Journal of Comparative Law* 393 (1978); Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* (West, 1994), § 8.5.

⁵⁷ See generally Andrew P. Le Sueur, *Legal Duties to Give Reasons*, 52 *Current Legal Problems* 150 (1999); David J. Mullan, *Administrative Law* (Irwin Law, 2001), 306–8; Donald J. M. Brown and John Maxwell Evans, *Judicial Review of Administrative Action in Canada* (Canvasback Publishing, 1998), §§12:5000–12:5520; Mark Aronson, Bruce Dyer, and Matthew Groves, *Judicial Review of Administrative Action in Australia* (3rd ed.) (Thomson, 2004), 555–6; Michael Taggart, “The Rationalisation of Administrative Tribunal Procedure: The New Zealand Experience” in Robin Creyke, ed., *Administrative Tribunals: Taking Stock* (Centre for International & Public Law, Australian National University, 1992), 91.

⁵⁸ The case that has turned the law in the United Kingdom and elsewhere toward requiring reasons on an *ad hoc* basis when fairness requires is *R. v. Secretary of State for the Home Department, ex parte Doody*, [1994] 1 AC 531.

⁵⁹ Paul Craig, *The Common Law, Reasons and Administrative Justice*, 53 *Cambridge Law Journal* 282 (1994); David Toube, *Requiring Reasons at Common Law*, [1997] *Judicial Review* 68; *Stefan v. General Medical Council*, [1999] 1 WLR 1293, 1301 (Privy Council, UK); *R. (Wooder) v. Feggetter*, [2003] QB 219. Cf. *Dad v. General Dental Council*, [2000] 1 WLR 1538, 1541–1542 (Privy Council, UK).

⁶⁰ *Baker v. Canada (Minister of Citizenship & Immigration)*, (1999) 174 D. L.R. (4th) 193. See Mary Liston, “‘Alert, alive and sensitive’: *Baker*, the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law” in David Dyzenhaus, ed., *The Unity of Public Law* (Hart Publishing, 2004), 113.

European Convention on Human Rights.⁶¹ Unlike the British experience with the European Convention, the experience elsewhere in the Commonwealth is that the judiciary has not been included within the scope of generally applicable statutory reasons requirements.

All these statutory and common law developments in administrative law have put pressure on judges to bring themselves into line with the trend toward legally enforceable reasoned elaboration. Hence in the past ten years courts in the U.K., New Zealand, and Canada have moved toward a legally enforceable duty to give reasoned decisions.⁶² In this, wittingly or not, these courts are following in the footsteps of Australian courts. Exceptionally, since the beginning of the twentieth century, Australian courts have consistently required reasoned decisions in judge-alone civil and criminal cases.⁶³ This has been described as “an incident of the judicial process.”⁶⁴ Why this development should have predated by almost a century contemporary movements in the U.K., Canada, and New Zealand is unclear.⁶⁵

⁶¹ See *Mousaka Inc. v. Golden Seagull Maritime Inc.*, [2002] 1 WLR 395; Patrick Birkinshaw, *European Public Law* (Butterworths, 2003), 363–5; Martin Shapiro, *The Giving Reasons Requirement*, 1992 University of Chicago Legal Forum 179, reprinted in Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press, 2002), ch. 4; Paul Craig, “Process and Substance in Judicial Review” in Grant Huscroft and Michael Taggart, eds., *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (University of Toronto Press, 2006), 162.

⁶² *Flannery v. Halifax Estate Agencies Ltd.*, [2000] 1 All ER 373; *R. v. Sheppard*, (2002) 210 D.L.R. (4th) 608; *R. v. Taito*, [2003] 3 N.Z.L.R. 577, [17] (Privy Council, New Zealand); *Murphy v. Rodney District Council*, [2004] 3 N.Z.L.R. 421, [25]; *Sharma v. Antoine*, [2006] UKPC 57, [26], [36]. See generally Hock Lai Ho, *The Judicial Duty to Give Reasons*, 20 Legal Studies 42 (2000).

⁶³ The case law is collected and surveyed in Michael Taggart, *Should Canadian Judges Be Legally Required to Give Reasoned Decisions in Civil Cases?*, 33 University of Toronto Law Journal 1 (1983); Michael Kirby, *Reasons for Judgment: ‘Always Permissible, Usually Desirable and Often Obligatory’*, 12 Australian Bar Review 121 (1994); Michael Kirby, *Ex Tempore Judgments – Reasons on the Run*, 25 University of Western Australia Law Review 213 (1995).

⁶⁴ *Housing Commission of NSW v. Tatmar Pastoral Co Pty Ltd.*, [1983] 3 N.S.W.L.R. 378, 386 (Mahoney, J.), quoted with approval in *Public Service Board of New South Wales v. Osmond*, (1986) 159 C.L.R. 656, 667 (Gibbs, C.J.) (adding that the giving of reasons was a “normal but not a universal” incident of the judicial process).

⁶⁵ In a review of a collection of essays that one of us edited and to which both of us contributed, Upendra Baxi noted the Eurocentricity of the treatment of the duty to give reasons in the administrative law context, pointing out that the courts of India and Botswana imposed common law reasons requirements before the “White” Commonwealth. See Upendra Baxi, *Review of The Unity of Public Law*, 14 Law and Politics Book Review 799, 804 (2004). Elsewhere one of us has drawn attention to the position in Vanuatu and Fiji. See Michael Taggart, *Administrative Law*, [2000] New Zealand Law Review 439, 442. Space constraints preclude a full review of the jurisprudence of courts from around the common law world. In view of Baxi’s charge, it should be noted that the obligation on criminal court judges to give reasoned decisions was settled in the early 1980s in the Caribbean. See, e.g., *Agui v. Pooran Maharaj*, (1983) 34 W.I.R. 282 (Trinidad & Tobago); *Alexander v. Williams*, (1984) 34 W.I.R. 340 (Trinidad & Tobago); *R. v. Simpson*, *R. v. Powell*, [1993] 3 L.R.C. 631 (Jamaica); *John (Nathaniel) v. R.*, (1994) 47 W.I.R. 122 (Eastern Caribbean States).

Paradoxically, in the mid-1980s the High Court of Australia felt no embarrassment in refusing to apply this strong line of authority regarding judges to require reasoned decisions of state administrative tribunals.⁶⁶ Gibbs C. J. said, “there is no justification for regarding rules which govern the exercise of judicial functions as necessarily applicable to administrative functions, which are different in kind.”⁶⁷ The High Court preferred to leave the imposition of reasons obligations on administrators to the legislature.⁶⁸ “In other common law countries,” Justice Michael Kirby observed recently, deliberately exempting Australia from the observation, “the law has moved in recent times, with general consistency, to insist on the importance of the giving reasons for valid and just decisions, not only by judges but also administrators.”⁶⁹

V. Functions of Courts: Findings and Reasons

In a modern common law legal system, the courts not only resolve disputes but also announce rules to govern in future cases.⁷⁰ Of course, the function(s) of the court differs at each level of the judicial hierarchy. The dispute-resolution function is discharged by first-instance courts (sometimes staffed by legally qualified professional judges and sometimes by wise lay people) doing justice according to law. The function is backward looking – settling the past dispute – and focuses on the immediate and limited audience of the litigants, their counsel, and others affected. This function tends to dominate the theory and practice of first-instance civil and criminal adjudication.

The second function of the courts can be described as law making or law announcing. These are cases in which the courts develop, change, or modify the law. In most cases at first instance and in many that reach the intermediate

See also Soli Sorabjee, “The Duty to Give Reasons in Administrative Law” in Venkat Iyer, ed., *Democracy, Human Rights, and the Rule of Law: Essays in Honour of Nani Palkhivala* (Butterworths, 2000), 93.

⁶⁶ *Osmond*, 159 C.L.R. at 667.

⁶⁷ *Osmond*, 159 C.L.R. at 667. This is not persuasive. See Michael Taggart, “*Osmond* in the High Court of Australia: Missed Opportunity” in Taggart, *Judicial Review of Administrative Action in the 1980s*, 53, 58–61; *Stefan*, 1 WLR at 1301–2; *Beale v. Government Insurance Office of New South Wales*, (1997) 48 N.S.W.L.R. 430, 441 (Meagher, J.) (common law duty on judge and statutory duty on administrators “essentially serve the same purpose”).

⁶⁸ For an update on developments since *Osmond*, see Margaret Allars, “Of Cocoons and Small ‘c’ Constitutionalism: The Principle of Legality and an Australian Perspective on *Baker*” in Dyzenhaus, *The Unity of Public Law*, 315–9.

⁶⁹ *Re Minister for Immigration and Multicultural and Indigenous Affairs, ex parte Palme*, (2003) 216 C.L.R. 212, [64] (Kirby, J., dissenting). See also Kirby, “Accountability and the Right to Reasons” in Taggart, *Judicial Review of Administrative Action in the 1980s*.

⁷⁰ This section draws on earlier work by one of us, and reference should be made to that work for footnote citations. See Taggart, *Should Canadian Judges Be Legally Required to Give Reasoned Decisions in Civil Cases?*, 33 *University of Toronto Law Journal* at 3–8. Direct quotations are referenced, as is relevant newer material.

appellate court, the controlling rule of law is not in controversy; rather what is disputed is the facts or the application of the law to the facts. But in those cases that necessitate adding to the “jurisprudence,” the court is reaching out to a wider audience, including the public, the bar, the media, academics, and other courts. The reasons for decision for judgment, buttressed by the doctrine of precedent and their innate persuasiveness, give some indication of how future disputes will be decided and give guidance to lawyers who advise the public as to the propriety of past, present, and future conduct. This is the forward-looking function of the courts and the reasoned decision.

This duality of function plays out in different ways in different common law systems and societies. The American literature – as well as the legal philosophers⁷¹ – largely ignores the trial courts.⁷² This may be just a hangover of the “appellate-court-itis”⁷³ condemned by the legal realists. While the Federal Rules of Civil Procedure require reasoned decisions in judge-alone trials,⁷⁴ this is the subject of almost no comment at all in an otherwise rich literature.⁷⁵ In Britain, in contrast, the lion’s share of criminal work is done by more than 30,000 lay justices who sit in more than 7,000 courts, and about 100 more are legally qualified stipendiary magistrates.⁷⁶ Until very recently the U.K. courts have been reticent to impose duties of explanation on these first-instance decision makers.⁷⁷ In 2001, magistrates’ courts adopted the practice of giving basic reasons as a matter of standard procedure.⁷⁸ The obvious spur was the

⁷¹ See Robert S. Summers, *Legal Institutions in Professor H. L. A. Hart’s Concept of Law*, 75 Notre Dame Law Review 1807 (2000).

⁷² Typical is the article by Justice Ruth Bader Ginsburg entitled *The Obligation to Reason Why?*, 37 Florida Law Review 205 (1985), which simply states that appellate judges demand no explanation from trial judges for credibility findings. Cf. Gerald Seniuk, *Judicial Fact-Finding and Contradictory Witnesses*, 37 Criminal Law Quarterly 70 (1994).

⁷³ Jerome Frank, *Cardozo and the Upper-court Myth*, 13 Law and Contemporary Problems 369, 386 (1948).

⁷⁴ Federal Rules of Civil Procedure, Rule 52(a). Cf. Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 Southern California Law Review 1618, 1624 (1988).

⁷⁵ The honorable exceptions mostly call in aid the U.S. Constitution. See Martha I. Morgan, *The Constitutional Right to Know Why*, 17 Harvard Civil Rights–Civil Liberties Law Review 297, 333–4 (1982); M. C. Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal*, 60 Iowa Law Review 205 (1974).

⁷⁶ A. T. H. Smith, ed., *Glanville Williams: Learning the Law* (12th ed.) (Sweet & Maxwell, 2002), 7–8.

⁷⁷ See C. F. Parker, “A Right to Know the Reasons for a Decision of a Magistrates’ Court” in J. W. Bridge, Dominik Lasok, D. L. Perrott, and R. O. Plender, eds., *Fundamental Rights: A Volume of Essays to Commemorate the 50th Anniversary of the Founding of the Law School in Exeter, 1923–1973* (Sweet & Maxwell, 1973), 189. This reticence has not extended to the Crown Court, which exercises appellate jurisdiction over magistrates and is staffed by professional judges. See *R. v. Harrow Crown Court, ex parte Dave*, [1994] 1 WLR 98.

⁷⁸ *McKerry v. Teesdale & Wear Valley Justices*, (2000) 164 Justice of the Peace 254. Cf. *Flannery*, 1 All ER at 377 (duty to give reasons “does not always or even usually apply in magistrates court”).

“domestication” of the European Convention of Human Rights and the European Court of Human Rights’ jurisprudence on reason-giving.⁷⁹

As cases progress up the hierarchy of the courts, the primacy of the dispute-resolution function gives way to the lawmaking function. At the highest appellate level “[t]he wrongs of aggrieved suitors are only algebraic symbols from which the court is to work out the formula of justice.”⁸⁰ Recognizing the different functions performed by courts helps our understanding of the part factual findings and reasons play at the various levels of the judicial process. Obviously, fact finding is closely bound up with the dispute-resolution role, which looms largest at the trial level, whereas in the lawmaking dimension the role of reasoning is crucial.⁸¹

The statement of factual findings and reasons reassures the litigants that the case has been thoroughly considered by the judge and satisfies the basic human demand of those affected by judicial action to be told why. In this way the losing litigant may be able to accept the decision. The statement of reasons connects the decision to criteria external to the judge and enhances the fairness of the process, as well as demonstrating the rationality of the process. It focuses the decision maker’s mind on the right issues. In the language of procedural fairness or due process, it can be said that the dignitary values of the person are respected, and public respect for the judicial process is enhanced.⁸² In some circumstances the obligation to reason may act as a brake on arbitrary decision making.

The judicial statement of findings and reasons also enables the losing litigant (with legal assistance in most cases) to determine whether good grounds exist for an appeal. Unexplained decisions both encourage appeals and make it difficult, even impossible, for the appellate court to determine whether the lower court erred. Where there is no appeal provided by statute, an unreasoned judgment in most cases similarly stymies judicial review. It can give no indication of how similar cases will be decided. Ultimately, it can give no assurance of equality of treatment. It is simply judicial fiat,⁸³ and the rule of (wo)men, not law. There is no accountability for the discharge of judicial office.

So judicial decisions supported by factual findings and reasons further the following values: (1) instrumental values – accuracy of decision making and

⁷⁹ *R. (on the application of McGowan) v. Brent Justices*, (2002) 166 Justice of the Peace 12; B. Gibson, *Reasons: The Hub of Human Rights*, 164 Justice of the Peace 755 (2000); P. Dawson and R. Stevens, *A Pro Forma for Justices’ Reasons Taking Account of the European Convention*, 164 Justice of the Peace 782 (2000). The courts are not prepared to permit lawyers to threaten magistrates “with the big stick” of the Convention in order to demand excessive reasons: [2002] Criminal Law Review 412, 413.

⁸⁰ Benjamin N. Cardozo, *The Jurisdiction of the Court of Appeals of the State of New York* (2nd ed.) (Banks & Co, 1909), § 6.

⁸¹ It is clear that factual findings and reasons serve similar but not identical purposes in judicial decisions, but for our present purpose they will be discussed together.

⁸² See Gerry Maher, “Natural Justice as Fairness” in Neil MacCormick and Peter Birks, eds., *The Legal Mind: Essays for Tony Honoré* (Oxford University Press, 1986), 103.

⁸³ See Fuller, *Reason and Fiat in Case Law*.

protection against arbitrariness, (2) dignitary values – individual participation and respect for human dignity, (3) institutional values – public relations and public order, and (4) constitutional values – access to information and facilitation of self-government.⁸⁴

This is mostly self-evident, if not trite. So why then did courts persist in maintaining the legal position that they were not obliged to give factually supported and reasoned judgments, or at least that that failure without more would not lead to overturning on appeal or invalidation on judicial review?⁸⁵ Of course, in modern times the doctrine of precedent must take its share of the blame, but that is not stopping the courts now reshaping the law.⁸⁶ A common objection has been that requiring reasoned decisions might overburden judges, who may not have time to write reasons in every case.⁸⁷ Such a requirement might be impractical given the workload of the lower courts, particularly if the judges are lay people. A related objection is the cost of giving and/or recording reasons, but no rigorous cost/benefit analysis ever accompanies this. A recurrent fear is that any reasons given will be picked over by lawyers and appellate courts, and busy judges will be held to unreasonably high standards by their judicial “betters” who suffer neither the time nor resource constraints of the lower judiciary.

Most of the alleged errors at the trial level concern facts, and requirements to explain credibility findings and other factual findings can degenerate into mechanical or formulistic mantras, or “canned” reasons.⁸⁸ One of the persistent objections to a duty to give reasons is that in resolving conflicts in evidence, explanation for choosing one account over another may not be rationally possible.⁸⁹ “They are matters of judgment, impression and sometimes even instinct, and it is quite impossible to give detailed reasons to explain how the system of decision has worked . . .”⁹⁰ This is the intuitive side of law that allegedly resists rational explanation.

As the law changes from no duty on judges to give reasons to a legally enforceable requirement to give reasons, the courts have to come to grips with the fact that in quite a few situations even professional judges have not been in the habit of explaining the rulings they make. Illustrations include the

⁸⁴ Morgan, *The Constitutional Right to Know Why*, 17 Harvard Civil Rights–Civil Liberties Law Review at 299.

⁸⁵ We do not deny that courts have over the centuries overturned and invalidated unreasoned decisions but for reasons other than breach of a common law rule requiring reasons.

⁸⁶ See generally *R. v. Higher Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 WLR 242, 256–7 (Sedley, J.).

⁸⁷ Of course, written reasons are not required, and in Anglo-Commonwealth jurisdictions (excluding the United States) oral, *ex tempore* judgments are often given. See generally J. E. Coté, *The Oral Judgment in the Canadian Appellate Courts*, 5 Journal of Appellate Practice and Process 436 (2003); Roman N. Komar, *Reasons for Judgment: A Handbook for Judges and Other Judicial Officers* (Butterworths, 1980), 14–16.

⁸⁸ See *R. v. Awatere*, [1982] 1 N.Z.L.R. 644; *R. v. MacPherson*, [1982] 1 N.Z.L.R. 650; *MacDonald v. R.*, [1977] 2 S.C.R. 665; *R. v. Burns*, [1994] 1 S.C.R. 656.

⁸⁹ *Flannery*, 1 All ER at 377 (Henry, J.).

⁹⁰ *Guppys (Bridport) Ltd. v. Sandoe*, (1975) 30 P & CR 69, 74–5 (Widgery, C.J.).

following: award of costs, dispatch of interlocutory matters, granting leave to appeal, listing decisions, disposing of procedural applications involving judicial discretion, admitting or excluding evidence, and resolving uncontested issues.⁹¹ The Australian courts, which have the longest experience in this field, say the duty to give reasons is a normal incident of the judicial function but not a universal one.⁹² The courts recognize that the situations are so “infinitely various” that it would be a mistake to lay down a rigid rule.⁹³ Consideration of workload and the realities of the courtroom are taken into account in calibrating the demands of the duty to give reasons.⁹⁴ Judges after all are human and no doubt want to retain some room for maneuver so that unmeritorious litigants cannot exploit a hard-edged rule to avoid otherwise unpalatable results. The law is evolving quickly, and many of the practices taken for granted are coming under scrutiny. This is not the place to consider the detail of the developments.⁹⁵ What is clear is that, after 800 years of development, the common law finally has progressed beyond exhortation. The development has been remarkably late in coming.

VI. The Changing Court-scape

We noted above several features of the common law that flowed from its historical development and the separation of record from reasons. It must be acknowledged now that technological advances and changed patterns of behavior have overtaken several of these distinctive features. The modern view is that the authority of a judicial decision in a significant sense comes from the justification or reasons given. In this sense, the reasons are part of the judge’s authority.⁹⁶ This is sometimes said to distinguish the judicial branch from the other branches of government.⁹⁷

In the home of the common law, in less than a generation, the civil judgment has evolved from an oral form of communication to one in writing⁹⁸; in this, the British are following in the footsteps of U.S. and Commonwealth courts. Technology has transformed also the length, form, and content of judgments,⁹⁹

⁹¹ See Ho, *The Judicial Duty to Give Reasons*, 20 *Legal Studies* at 53–55; Kirby, *Reasons for Judgment*, 12 *Australian Bar Review* at 126–30.

⁹² See note 64.

⁹³ *Flannery*, 1 All ER at 378 (Henry, J.).

⁹⁴ See, e.g., *Soulemezis v. Dudley (Holdings) Pty Ltd.*, (1987) 10 N.S.W.L.R. 247, 279 (McHugh, J.).

⁹⁵ See Ho, *The Judicial Duty to Give Reasons*.

⁹⁶ Charles Fried, *Scholars and Judges: Reason and Power*, 23 *Harvard Journal of Law and Public Policy* 807, 832 (2000). See Piero Calamandrei, *Procedure and Democracy* (New York University Press, 1956), 53 (through reason-giving the judge “seeks to impress [the parties] with the reasonableness of the command”).

⁹⁷ Fried, *Scholars and Judges*.

⁹⁸ Munday, *Judicial Configurations*, 61 *Cambridge Law Journal* at 614.

⁹⁹ Munday, *Judicial Configurations*, 61 *Cambridge Law Journal* at 616; Hedley, “Words, Words, Words” in Stebbings, *Law Reporting in Britain*, 169.

just as the Internet has revolutionized their distribution and the global reach of the common law(s) and some judges.¹⁰⁰ Governments have even claimed copyright in reasons for judgments in order to cope with the rise of electronic databases.¹⁰¹ The avalanche of available material has forced many jurisdictions to limit publication and/or citation of judgments deemed unworthy of wider distribution.¹⁰² Precedent as a system may be breaking down under the sheer weight of case law. Many of these concerns are not new, but the pressure has increased markedly in the past thirty years. It is perhaps not coincidental that it is over this period that the case for a legally enforceable duty to give reasoned decisions has been mounted in earnest and finally is winning the day. The judgment (record) and reasons are finally reunited after separation at the birth of the common law hundreds of years ago.¹⁰³

VII. The Pull of Justification

So far we have traced the development within the practice of the common law of a duty to give reasons. As we have shown, judges did not consider themselves under a duty to give reasons until very recently. Moreover, it was only after they began to discover such a duty for administrative decision makers, a discovery

¹⁰⁰ See generally Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 *Tulsa Law Journal* 15 (1998); Anne-Marie Slaughter, *Judicial Globalization*, 40 *Virginia Journal of International Law* 1103 (2000); Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 *Oxford Journal of Legal Studies* 499 (2000), reprinted in Katherine O'Donovan and Gerry R. Rubin, eds., *Human Rights and Legal History: Essays in Honour of Brian Simpson* (Oxford University Press, 2000).

¹⁰¹ C. J. Bannon, *Copyright in Reasons for Judgment and Law Reporting*, 56 *Australian Law Journal* 59 (1982). The better view is to the contrary. See note 43 and accompanying text.

¹⁰² This has changed dramatically. See Roderick Munday, *Over-Citation: Stemming the Tide*, 166 *Justice of the Peace* 6, 29, 83 (2002). For a snapshot of the voluminous literature in the United States, see Stephen R. Barnett, "'Unpublished' Judicial Opinions in the United States: Law or Not?" in Talia Einhorn, ed., *Spontaneous Order, Organization and the Law: Roads to a European Civil Society* (T.M.C. Asser Press, 2003). Cf. R. M. Hope, "The Problem of Unpublished Decisions" in A. E. S. Tay, ed., *Law and Australian Legal Thinking in the 1980s: A Collection of the Australian Contributions to the 12th Congress of Comparative Law 1986* (University of Sydney, 1987), 629.

¹⁰³ But all this may be a harbinger of other, less enlightened changes in the common law system. There is considerable evidence that the form of the judgment is changing in almost every jurisdiction. In the United Kingdom, see three interconnected papers by Roderick Munday: 'All for One and One for All': *The Rise of Prominence of the Composite Judgment Within the Civil Division of the Court of Appeal*, 61 *Cambridge Law Journal* 321 (2002); *Judicial Configurations*, 61 *Cambridge Law Journal* 612; *Reasoning Without Dissent; Dissenting Without Reason*, 168 *Justice of the Peace* 968, 991 (2004). Munday's description of what is going on in the U.K. resonates with experience elsewhere in the common law world. In much of this one can see the new managerialism that is threatening judicial independence. The "time and motions" dictates of law and economics go hand-in-hand with the positivization of the law that many of these changes symbolize. That, however, is a topic for another day.

prompted by legislative interventions, that they began to think of themselves as under such a duty.¹⁰⁴ So while their decisions were regarded as authoritative, they did not regard themselves as under a legally enforceable duty to justify the authority of their decisions.

This position presupposes a conception of authority that is at odds with the central idea of the common law tradition:¹⁰⁵ that law is the expression of reason and moreover a reason that is artificial, not private. Such reason draws on a public stock of those moral values that are fundamental to a society and hence considered to be part of its legal constitution.¹⁰⁶ It would seem to follow from this claim that a decision within the common law legal order may not rest on fiat – the fact that the body or official who gave the decision has authority – for its claim to be authoritative. Rather, the decision has authority if and only if it is also in accordance with reason, or, in other words, reasonable.

So in principle the common law tradition seems committed to rejecting what we can call a command conception of authority, or authority by fiat, because its conception is reason-based. At the least, it is committed to rejecting the command conception of authority as providing the whole or even the main part of an explanation of the authority of law. In this way, the common law exhibits what we will refer to as the pull of justification, meaning that public power is considered authoritative when and only when it justifies its exercise to those whom it affects. And it is a short theoretical, if not historical, step from a commitment to a reason-based conception of authority to a constitutional requirement of a duty to give reasons, a step from presumed reasonableness to demonstrated or justified reasonableness.

The classic definition of the command conception of authority was given by Thomas Hobbes in *Leviathan*:

COMMAND is, where a man saith, *Doe this*, or *Doe not this*, without expecting other reason than the Will of him that sayes it. From this it followeth manifestly, that he that Commandeth, pretendeth thereby his own benefit: For the reason of his Command is his own Will onely; and the proper object of every mans Will, is some Good to himselfe.¹⁰⁷

Hobbes tells us that we obey a command not because the commander gives us reasons to justify the command but because the command comes from the commander. As Hobbes tells us in the passage just quoted, we should suppose that the commander is self-interested.

¹⁰⁴ See notes 56–61 and accompanying text.

¹⁰⁵ See generally Melvin Aron Eisenberg, *The Nature of the Common Law* (Harvard University Press, 1988), esp. ch. 8.

¹⁰⁶ See the description in T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001), 249.

¹⁰⁷ Thomas Hobbes, *Leviathan* (Richard Tuck, ed.) (Cambridge University Press, 1997), ch. 25 [131–2], 303.

It is clear, however, that Hobbes thinks we do have reason to obey the commander. In Chapter 5 of *Leviathan*, he presents the argument of the whole work in nutshell form:

But no one mans Reason, nor the Reason of any one number of men, makes the certaintie; no more than an account is therefore well cast up, because a great many men have unanimously approved it. And therefore, as when there is a controversy in an account, the parties must by their own accord, set up for right Reason, the Reason of some Arbitrator, or Judge, to whose sentence they will both stand, or their controversie must either come to blowes, or be undecided, for want of a right Reason constituted by Nature; so it is also in all debates of what kind soever; And when men that think themselves wiser than all others, clamor and demand right Reason for judge; yet seek no more, but that things should be determined, by no other mens reason but their own, it is as intolerable in the society of men, as it is in play after trump is turned, to use for trump on every occasion, that suite whereof they have most in their hand.¹⁰⁸

We learn from this passage that in cases of conflict we cannot rely as individuals on our own natural reason to resolve the conflict. This does not leave us without a rational solution because we can turn to a third party – the arbitrator – to resolve the conflict for us. But this solution will work only if we take the third party's decision as representing right reason. In order to do that, we have to understand the arbitrator's decision as a command, as an edict we should obey because he issued it, and not because it is in accordance with our sense of right reason. Our political sovereign is then the body or person who is the supreme arbitrator of our society, and we obey his commands because such obedience provides us with the security and stability we need if we are to escape perpetual conflict with one another – the state of nature.

Two more features flow as a matter of logic from the command conception of authority. First, the commander is under no duty to offer reasons for his decisions. Indeed, for him to offer reasons might lead us to make the mistake that it is his reasons for the command and not his role as commander that is the basis for our obedience. And that might lead to the further mistake of supposing that if the reasons do not seem to justify the command, we need not obey. In sum, a ban on reasons might be the best way of filling out the command conception, but, at the least, there can be no duty to give reasons. The second feature is that in order for the command to work it must be the case that we can determine its content without having to engage in inquiry into what reasons the sovereign had for issuing the command. In other words, the command has to have a determinate content to it, a content that can be determined by factual, that is, non-evaluative, tests. For if the command does not have such content, we are thrown back on our sense of appropriate reasons, precisely the situation that our submission to authority was supposed to avoid.

¹⁰⁸ Hobbes, *Leviathan*, ch. 5 [19], 32–3.

Now while Hobbes does articulate the command conception of authority, what makes his philosophy of law so intriguing is that he does not think it can by itself be the basis for designing a legal order. The decision to submit to authority requires the individual in a state of nature to see more than that it is rational to have a sovereign in place to make judgments of right and wrong on matters that would otherwise be the subject of perpetual and corrosive conflict. The individual must also see that such a sovereign will be subject to the laws of nature, laws that include requirements familiar to us today from debates about the rule of law – for example, requirements of impartial adjudication, fairness, reasonableness, and that those subject to the law should be treated in accordance with a principle of equality.¹⁰⁹ The individual has reason to submit then not only because submission promises security or escape from perpetual conflict but also because the sovereign's commands are judgments and judgments will comply with criteria that make them more than a conflict-resolving fiat. The judgments will, that is, be reasonable – justifiable by reasons that pertain to the very foundation of political and legal order. In sum, it seems as though Hobbes at one and the same time puts forward the reason-based conception and the command conception of authority.

One way of reconciling the tension this creates in Hobbes's legal theory is to note that for Hobbes the sovereign's accountability to the laws of nature seems to be an accountability to God, not to his subjects.¹¹⁰ Moreover, subjects are obliged to understand the content of the sovereign's commands – the content of the positive law – as definitive expressions of what the laws of nature require. In short, while right reason is reason that does more than settle conflict – it also conforms to the laws of nature – the sovereign's commands are to be understood as right reason – that is, as conforming by definition to the laws of nature.

However, as Hobbes makes clear in his treatment of law in Chapter 26 of *Leviathan*, he does not himself accept this solution. As we will now show, Hobbes, no less than Fuller, saw that while “law was by its limitations fiat,” it is by “its aspirations reason,” so that the “whole view” of law involves a “recognition of both its limitations and its aspirations.”¹¹¹

Hobbes clearly sees the impossibility of a sovereign providing a determinate content to his general commands that will in advance settle all disputes about what the law requires. As he says, all laws require interpretation, and so the sovereign has to establish a staff of judges to interpret the sovereign's commands.¹¹² When judges perform this role, they are quasi- or mini-sovereigns, because they must themselves interpret the laws of nature in order to render the

¹⁰⁹ For further discussion, see David Dyzenhaus, *Hobbes and the Legitimacy of Law*, 20 *Law and Philosophy* 461 (2001).

¹¹⁰ See Howard Warrender, *The Political Theory of Hobbes: His Theory of Obligation* (Oxford University Press, 1957).

¹¹¹ Fuller, *Reason and Fiat in Case Law*, 59 *Harvard Law Review* at 377.

¹¹² Hobbes, *Leviathan*, ch. 26 [143], 190.

law determinate. One might think that there is no problem yet for the command conception of authority as long as subjects accept the judges' judgments as definitive of what the laws of nature require. All we have in place is the role of fiat in filling in gaps that arise in the law.

But Hobbes does not confine judges to the role of settling indeterminacy. He is also clear that judges insult their sovereign if they do not bend over backward to interpret all of his law as if it were intended to be in compliance with the laws of nature.¹¹³ And in making this argument he sets out an interpretative obligation for judges that requires them to bring the law, law by fiat, into line with law's aspiration to conform to a reason-based conception of authority. Such an interpretative obligation makes the sovereign as accountable to the laws of nature as the U.K. Parliament is today accountable to the Human Rights Act (1998) through the judicial obligation in section 3 to interpret statutes as if they were intended to respect human rights. Of course, Parliament might enact laws that are so clearly obnoxious to human rights that they cannot be interpreted in a rights-friendly way. At that point, judges have no authority to invalidate the law but simply issue a declaration of incompatibility. And it is significant that Hobbes seems to suggest a very similar device for signaling when a positive law cannot be interpreted in a way that makes it conform to the laws of nature.¹¹⁴

In both cases, the law remains valid. But it is under a cloud of legal doubt from the perspective of law itself, in the first case, from the perspective of a legal order in which it is accepted that obedience to law is conditional on respect for human rights, and in the second, from the perspective of a legal order in which it is accepted that obedience to law is conditional on respect for the laws of nature. Insofar as the sovereign manifests disrespect for the very basis of obedience, so he puts strain both on that obedience and on the claim that he rules through law.

It is important to emphasize now, for reasons that will become apparent in the discussion of conceptual positivism, that in both these cases the legal doubt does not come about because of values that have a merely contingent presence in the law of a particular jurisdiction. For both Hobbes and human-rights enthusiasts the point of law is to secure an appropriate relationship between sovereign and legal subject. That point is developed by reflecting on how law will best serve the interests of the subject, so that she will accept that it is rational for her to submit to law's authority. And in the course of reflecting on this topic one will generate an understanding of the structure of appropriate practical reasoning

¹¹³ Hobbes enjoins judges to operate on the interpretative assumption that the intention of the "Legislator is alwayes supposed to be Equity; For it were great contumely for a Judge to think otherwise of the Sovereign." *Leviathan*, chap. 26 [145], 326.

¹¹⁴ The judge, Hobbes says, "ought therefore, if the Word of the Law doe not fully authorise a reasonable Sentence, to supply it with the Law of Nature; or if the case be difficult, to respite Judgment till he have received more ample authority." *Leviathan*, ch. 26 [145], 326.

about the actual requirements of the law, a structure whose components embody the fundamental or constitutional values of legal order, in sum the rule of law. In this sense, both Hobbes and human-rights enthusiasts are natural lawyers, but the moral values they find inherent in law are not taken from outside of the legal order and then incorporated into its positive law. Rather, they are the values that make sense of the idea of law and thus of legal order and that thus become candidates for positive enactment or even entrenchment. There is then no sharp distinction between the idea or concept of law, on the one hand, and the positive law of a legal order, on the other. For how one is to understand the latter is deeply influenced by one's understanding of the former. Moreover, this view of the link between the aspirations of "law," understood in the abstract, and "the law" – that is, the positive law – is also typical of the common law tradition so that in this sense the common law tradition is also a natural law one. For while the common law tradition insists that the reason of the law is artificial, disciplined by the requirement that lawyers and judges must show what the law requires, the tradition also insists that the reason displayed in this exercise show the law to be just.

However, this commonality is one of methodology – a methodology which requires that exercises of legal power be exercises that must be justified to those subject to the power – rather than substance. One can agree about it and disagree both about what the fundamental values of the legal order are and about the best way to arrange the institutions of legal order so as to bring them to realization. To put it differently, one's sense of what the content of these values and institutions are might be contingent, but that there are such values and that institutions should be arranged so as to bring them to realization is not contingent. Moreover, despite the fact of disagreement about the precise list of rule-of-law values, there is over time a rather remarkable core to our understandings of the values. In a way, more variation is to be found in ideas about institutional arrangements.

In this last respect, Hobbes wanted to do away with the common law. He wanted this both because he thought that the sovereign had to have a monopoly on lawmaking power in order to secure stability and because he was concerned about the prospect that a judge's incorrect understanding of the laws of nature might be considered to have force beyond the dispute the judge had decided.¹¹⁵ So he gives an expansive role to judges in interpreting the positive law in the light of the laws of nature and at the same time confines the force of their interpretations to the case before them.

But the fact that judges are so confined does not mean that the command conception of authority trumps the reason-based conception. Rather, the command conception provides the material that judges interpret for subjects in accordance with the reason-based conception. If they are unable to perform that role with

¹¹⁵ Hobbes, *Leviathan*, ch. 26 [146], 193–4.

a particular command, the command remains valid, but its very authority is in doubt because it has strayed from its constitutional foundation. It remains valid because Hobbes will always opt for stability over instability, though it is important to keep in mind that the stability achieved here through continued validity is hardly rock solid, as the sovereign has chosen to put the basis for subjects' obedience to law under stress.

If Hobbes does not put forward the command conception of authority as the exclusive or even principal basis of authority, it might seem that Jeremy Bentham's theory of law is closer to being modeled on the command conception.¹¹⁶ For Bentham argues that law is simply the instrument of utility, not the expression of a conception of the natural rights of the subject. That is, for Bentham, law is simply an efficient means of conveying judgments about general welfare made by the representatives of the people, so that it is not conceived as serving a point that can then generate a structure which constrains interpretation of the law. But Bentham, no less than Hobbes, sees the need for interpretation of the law and thus for a staff of judges.

We have noted that Bentham in his early work thought that a strict notion of *stare decisis* might increase the certainty of the law through publicity of judges' reasons. His point was to make judges adhere to past decisions not because of the decisions' conformity with natural law or principles of right reason but because they had been made and so should be followed for the sake of uniformity and stability.¹¹⁷ But Bentham gave up on this idea in light of the transaction costs. In addition, a strict notion of *stare decisis* is a cure for only one problem – the problem of legal indeterminacy. It does not deal with another problem, the need to adapt the law so that it does not cause injustice in particular cases. In short, it does not deal with the need to balance certainty and flexibility.

In order to deal with this second problem, Bentham proposed that all laws be made by the legislature according to the principle of utility and be set out in an all-embracing code. The role of judges would be to resolve individual disputes by appeal to the utilities in that particular case,¹¹⁸ and the decision reached would be denied any precedential effect whatsoever. A decision would be like a used bus ticket, good only for that journey.¹¹⁹ Bentham still envisaged that

¹¹⁶ For discussion of the relationship between the work of Bentham and Hobbes, see James E. Crimmins, *Bentham and Hobbes: An Issue of Influence*, 63 *Journal of the History of Ideas* 677 (2002).

¹¹⁷ Postema, *Bentham and the Common Law Tradition*, 195.

¹¹⁸ Postema thought that Bentham would have allowed the judge to contradict the code if the circumstances justified doing so. See Postema, *Bentham and the Common Law Tradition*, 454. There is dispute as to whether Bentham actually advocated this course of action. See J. R. Dinwiddy, *Adjudication under Bentham's Pannomion*, 1 *Utilitas* 283 (1989).

¹¹⁹ *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (the statement was made with reference to overruling a recent precedent).

judges would give reasoned decisions, as this would ensure their accountability to the people through “mobilization of public opinion” and the application of “the moral sanction.”¹²⁰ The reasons given, however, would not in his view destabilize the laws or code, as there was no direct connection between legislation and adjudication.¹²¹ Thus Bentham attempted to sever the link between the two, in order to maximize certainty while allowing for flexibility.

But, as Gerald Postema has argued, if Bentham’s scheme had been attempted, it might have proved self-subverting. Once the public realized that the judges (for what they considered to be compelling utilitarian reasons) were not applying the code, public expectations would focus on the activities of the courts and something like precedent-based case law would emerge.¹²² One might then suppose that Bentham should have gone beyond denying judicial decisions any precedential force and insisted that judges offer no reasons for decision.¹²³ But Bentham would have been loath to contemplate this step because he believed so strongly in the publicity of law.¹²⁴

Most fundamentally, to allow or even to require unreasoned decisions would run up against the grain of the Enlightenment project – namely, the claim that acquiescence to power should be reason-based.¹²⁵ Bentham’s insistence on reasons for decision might then destabilize his ideal legal order. But that is because, try as he might, he cannot escape altogether the allure of a position in philosophy of law which seeks to show that the point of law is to serve the rights of the subject. His attempt to substitute for the rhetoric of natural rights, for “nonsense upon stilts,” the hard-edged language of utility has the paradoxical result that it pits legislative against judicial judgments about utility. In contrast, Hobbes and the exponents of the common law tradition, the common law romantics, understand the judicial role as attempting to show that legislative judgments conform to the fundamental values of legal order, because they

¹²⁰ Postema, *Bentham and the Common Law Tradition*, 367.

¹²¹ See Lieberman, *The Province of Legislation Determined*, ch. 11 (explaining why Bentham thought the common law could not exist as a system of general rules).

¹²² Postema, *Bentham and the Common Law Tradition*, 454.

¹²³ So it was that Brian Simpson concluded his classic piece “The Common Law and Legal Theory” by remarking that “the only effective technique for reducing the common law to a set of rules is codification, coupled of course with a deliberate reduction in the status of the judiciary and some sort of ban on law reporting.” Simpson, *Oxford Essays in Jurisprudence (Second Series)*, 99.

¹²⁴ Bentham argued that publicity was essential for full accountability in the exercise of public power. See Gerald J. Postema, “In Defence of ‘French Nonsense’: Fundamental Rights in Constitutional Jurisprudence” in Neil MacCormick and Zenon Bankowski, eds., *Enlightenment, Rights and Revolution: Essays in Legal and Social Philosophy* (Aberdeen University Press, 1989), 107, 119. See generally Postema, *Bentham and the Common Law Tradition*, 363–73; Munday, *Bentham, Bacon and the Movement for the Reform of English Law Reporting*.

¹²⁵ James E. Crimmins, *The Common Law and Benthamite Praxis*, 3 *Canadian Journal of Law and Jurisprudence* 145, 154 (1990).

consider both Parliament and the judges to be involved in a common project of bringing these values to realization.¹²⁶

It is thus Bentham's insistence that there are no inherent or intrinsic values to legal order, except perhaps for publicity and clarity, that leads to the clash of naked judgments about utility. Indeed, it might be that Bentham could achieve his end without running the risk of self-subversion not by banning reasons for judgment but by banning judges from any pretense that what they were doing involved interpreting the law. In short, they would disavow that their reasons for judgment are legal reasons and couch their reasoning in the pure language of moral arithmetic.¹²⁷ But such a proposal seems even more outlandish to anyone who wants to live under the rule of law than a ban on reasons. And that tells us something about the pull of justification that seems to be part of the idea of rule through law. The pull is to more than a claim that decisions by those with legal authority should be justified by reasons as well as justifiable; the pull goes to the claim that the reasons that justify should be legal reasons – that is, reasons which rely on the resources made available by law.¹²⁸

Bentham might well have displayed his awareness of this phenomenon through his relentless bid to purge law of common law understandings of fundamental values by reducing it to a set of rules of determinate content, each rule

¹²⁶ See Dyzenhaus, *Hobbes and the Legitimacy of Law*. The best evidence for this claim in *Leviathan* is in the Introduction. See Hobbes, *Leviathan*, [2], 9–10.

¹²⁷ If such a requirement or a ban on reasons is necessary to stop Bentham's project from self-subverting, it follows that he cannot be categorized as a natural lawyer, in the way Amanda Perreau-Saussine has attempted. See Amanda Perreau-Saussine, *Bentham and the Boot-Strappers of Jurisprudence: The Moral Commitments of a Rationalist Legal Positivist*, 63 *Cambridge Law Journal* 346 (2004). Perreau-Saussine's argument does a wonderful job of explaining why Bentham cannot be easily categorized as a legal positivist, but the need to do this job arises from accepting the way that conceptual legal positivists have distorted our understanding of positivism's past. Once positivism is seen as not conceptual in nature but highly political, there is no problem in categorizing Bentham as a legal positivist. Moreover, we are then in a position to see why the fact that one's account of law is both political and normative does not by itself make one a natural lawyer. To be a natural lawyer, one has also to argue that the pull to justification imposes a structure disciplined by law on argument within the practice about what decisions practitioners are duty-bound to make.

¹²⁸ Napoleon, following in the footsteps of Justinian, prohibited commentaries on the Code lest judges and jurists use them to bootstrap themselves into positions of legal authority. But in France judges were still compelled to issue reasons for decision in order to demonstrate their fidelity to the Code. Because this was the rationale for reasons, very sparse reasons were required and dissenting decisions were suppressed. See Donald R. Kelley, *What Pleases the Prince: Justinian, Napoleon and the Lawyers*, 23 *History of Political Thought* 288 (2002); Vernon V. Palmer, *From Embrace to Banishment: A Study of Judicial Equity in France*, 47 *American Journal of Comparative Law* 277 (1999); John Henry Merryman, *The French Deviation*, 44 *American Journal of Comparative Law* 109, 112 (1996). Note that prior to the French Revolution, judicial decisions in France typically did not contain any reasons at all. See, e.g., Michael Wells, *French and American Judicial Opinions*, 19 *Yale Journal of International Law* 81, 105–7 (1994).

containing a settled judgment about utility. But, as we have seen, that means that on the occasions when judges appropriately do something other than apply the rules, whether to deal with what seems to be uncertainty in the law or to respond to the fact that a determinate rule seems to create injustice, they do this undisciplined by the requirement to explain what they are doing as an interpretation of the law.

One might react to this point by welcoming it as introducing a refreshing candor into our approach to adjudication. For one might suppose that the fiction adopted by common law judges that they do not make law is “childish,” as H. L. A. Hart following John Austin described it.¹²⁹ It would then be far better, as Hart advocated, to understand the judicial role as legislative in nature, so that we hold judges accountable for making decisions that are ultimately driven by their personal sense of right and wrong, not by their understanding of the law.¹³⁰

But we need also to remember that, under Hart’s direction, legal positivism moved in the mid–twentieth century away from its political roots and took a deliberately conceptual turn. By this we mean a turn to analysis of the concept of law as if this could be done without relying on political assumptions that shape one’s claims about law in ways that have direct implications for practice. However, traces of the original political assumptions of legal positivism continue to play a subliminal role in conceptual legal positivism, in that it continues to hang on to the command conception of authority.

Conceptual legal positivism no longer advocates a reform of legal order to get rid of the common law. But its command conception of authority means that it offers an understanding of the common law that has no relation to the self-understanding of its practitioners and hence no relevance to practice.¹³¹ Following Hart, conceptual legal positivists claim that when common law judges decide hard cases, they are exercising a quasi-legislative discretion. But in order to make this claim, Hart had to take over wholesale much of Bentham’s legal positivism, most notably the command conception of authority with its idea that the law consists of rules of determinate content. Hart, of course, argued that he had departed from Bentham and John Austin in rejecting the idea that the sovereign is not subject to law – that he is an uncommanded commander.¹³² But Hart’s idea that the sovereign law maker has to comply with law in order to have his commands recognized as law is not only consistent with the command

¹²⁹ Hart, “Positivism and the Separation of Law and Morals” in Hart, *Essays in Jurisprudence and Philosophy*, 66.

¹³⁰ Hart, “Positivism and the Separation of Law and Morals” in Hart, *Essays in Jurisprudence and Philosophy*, 66–72.

¹³¹ See William Twining, *Academic Law and Legal Philosophy: The Significance of Herbert Hart*, 95 *Law Quarterly Review* 557 (1979).

¹³² Hart, “Positivism and the Separation of Law and Morals” in Hart, *Essays in Jurisprudence and Philosophy*, 59–62.

conception of authority, it is actually required by it. The command conception requires that there be public tests for identifying both the sources of law and the content of particular laws. When Bentham and Austin after him, and for that matter Hobbes before them, claimed that the sovereign was not bound by law, they meant not bound by the law of another sovereign, and not that the sovereign could make law without complying with the legal order's criteria for making valid law.¹³³

It was in fact Hart's other departure from Bentham and Austin that marked a real change. In our view, Hart's magnificent manifesto for legal positivism, his 1958 lecture at Harvard Law School, "Positivism and the Separation of Law and Morals," was caught between two tendencies: on the one hand, the Benthamite desire to make philosophy of law responsive to legal practice; on the other, the tendency of Oxford philosophy of language to unpack concepts by reflecting on their ordinary use, which meant perforce use in Oxford common rooms.¹³⁴ In this manifesto, the Benthamite tendency is dominant¹³⁵ but, by 1961, with the publication of the first edition of *The Concept of Law*, philosophy of language dominates, with practical concerns relegated for the most part to the end of the book. Legal positivism becomes a conceptual inquiry into the nature of law, almost entirely detached from its political roots.

Hart clearly thought that he was able to detach legal positivism in this way because one could unpack the concept of law through a purely conceptual inquiry. He and positivists since have insisted that if one wants to understand law, one must understand it as a concept detached not only from the political aspirations of their predecessors, but also as detached from the parochial features of particular legal orders.¹³⁶ Conceptual legal positivists thus argue that the task of understanding "law" is distinct from understanding "the law." Philosophers of law must, in their view, offer an understanding of law in the abstract, in the detached sense just given, while lawyers and others are concerned to answer the kinds of questions that face participants in legal practice, whether they are intent on just moving along in the practice of law or wish to reform it. Hence, conceptual legal positivists no longer think it appropriate that philosophy of law concern itself with the lawyer's inquiry into law's practice.

¹³³ Howard Warrender explained why Hobbes must allow for rule-of-recognition-type constraints just before Hart had articulated the idea for which his legal theory is famous. See Warrender, *The Political Theory of Hobbes*, 258–63. For discussion of Hobbes and the rule of recognition, see Robert Ladenson, *In Defense of a Hobbesian Conception of Law*, 9 *Philosophy and Public Affairs* 134 (1980).

¹³⁴ See Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004), esp. ch. 6 ("Oxford from the Other Side of the Fence").

¹³⁵ Hart, "Positivism and the Separation of Law and Morals" in Hart, *Essays in Jurisprudence and Philosophy*, 50–6.

¹³⁶ See Hart's statement of this position in the Postscript to *The Concept of Law*. H. L. A. Hart, *The Concept of Law* (2nd ed.) (Oxford University Press, 1994), 239–40.

It is important to see that, in making this argument, conceptual legal positivists seek to reverse the order of philosophical thought about law in order to exclude from the community of legal philosophers those who do not accept their terms.¹³⁷ As we have indicated, the natural law tradition, in which we include common law romantics, is characterized by a normative conception of the authority of law which is intended to inform the way that the law is practiced, including the answers that practitioners give to questions about what the positive law requires. But conceptual legal positivists stipulatively define law in the abstract in order to meet an alleged theoretical necessity of detachment from practice. That no such detachment is possible is demonstrated by the fact that their abstract concept of law is not abstract at all. Rather, it is a version of Bentham's answer to the problems he perceived in legal practice.

Recall that the concept of law nested in the command conception of authority is for Bentham ultimately part of a reform program that sought to rid legal order of the common law, replacing it with a codified system of determinate rules. But once extracted from that program, the concept can no longer be deployed in advocating getting rid of the common law. Rather, it is forced to try to reduce the common law to an alien concept, the model of rules.¹³⁸ As we have seen,

¹³⁷ See the report by Dworkin of an exchange between John Gardner and himself in Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 *Oxford Journal of Legal Studies* 1, 36–7 (2004), reprinted in Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006), 185, where Gardner says that Dworkin's "trouble" is that he thinks that legal philosophy should be "interesting." It is unfortunately the case that some philosophers of law in Oxford come close now to open disparagement of Dworkin as not a real philosopher but merely a "theoretically ambitious" lawyer. See, e.g., John Gardner, *The Legality of Law*, 17 *Ratio Juris* 168, 173 (2004). Gardner adds that he does not mean by this claim to "underestimate the philosophical importance of [Dworkin's] work." But we wonder then why he made the claim. Note that Gardner has similarly claimed that Gerald Postema's work, which is the most profound philosophical treatment of the common law tradition, is "anti-philosophical." See John Gardner, *Legal Positivism: 5½ Myths*, 46 *American Journal of Jurisprudence* 222, 223 (2001). If Gardner (and others) is right, then Hart was profoundly wrong to ensure Dworkin's succession to the Chair in Jurisprudence, which Hart held at Oxford, and to which Gardner succeeded Dworkin. (For a description of Hart's behind the scenes efforts in this regard, see Lacey, *A Life of H. L. A. Hart*, 290–3.) It is impossible to imagine that Hart thought that the distinction between law and the law which is central to the conceptual positivist line of inquiry is so unassailable that one has to be obtuse (as Gardner seems to suggest) to contest it. See Gardner, *The Legality of Law*, 17 *Ratio Juris* at 174. For Dworkin's work has from the start explicitly contested that distinction, and it was on the basis of that work that Hart formed his views about who should succeed him.

¹³⁸ As Dworkin called it. See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), chs. 2 and 3. In *The Concept of Law*, Hart sets out his last response to Dworkin's critique. See Hart, *The Concept of Law*, 263–8. But he does not go much beyond elaborating the response that Dworkin had already anticipated and criticized in *The Model of Rules I*: Because positivism could not deny the existence and importance of legal principles, it would attempt to make their existence dependent on a rule, the master rule of recognition, whose basis is a convention among legal officials. In particular, Hart leaves unanswered the question, which Dworkin posed, whether a conventional explanation suffices when agreement about principles seems to require conviction about their rightness rather than a mere fact of convergence.

Bentham himself gave up on the attempt to reduce the common law to rules and so advocated getting rid of it altogether. But because conceptual legal positivists cannot admit that their concept of law is political, they bar themselves from following the logic of Bentham's argument. They are still stuck with the problem of working with a Benthamite concept of law that requires them to attempt to reduce the common law to the model of rules. And, insofar as the common law cannot be so reduced, they have to declare its features to be not law but rather elements extraneous to law that will inform a judge's quasi-legislative exercise of discretion.¹³⁹

Conceptual legal positivists do not, however, refrain altogether from advocacy. Hart, as we have mentioned, does think it serves us better to describe what judges do in this way than to adopt the common law's "childish fiction" that judges do not make law. But it is better only if one is concerned with Bentham that judges will use that fiction to grab power that properly belongs to the legislature. Hart, in other words, is entitled to the point about childish fictions only as long as he is willing to embrace the political commitments that underpin it. If, on the other hand, one is working as a judge within the practice of the common law, or if one is seeking to explain what that judge is attempting to do in a way that is faithful to his or her internal or participant's point of view, one must assume that answers to questions of law are fully determined by law. For the judge is committed to more than the reason-based conception of authority. He or she is also committed to the rule of law, so that the reasons offered must all be legal reasons, because decisions are supposed to meet the aspiration of a legal order committed to the rule of law. For a judge to say, as Hart would advocate, "I am deciding the case this way rather than that because this is my sense of how best to do things" would be for the judge to slough off the discipline of legal reasons and to adopt the role of legislator.

The discipline of reasons is exerted through the requirement to display what the best answer to the question is, given existing legal resources. To say then that the answer is fully determined by law means that the answer is determined by some complex interplay between one's idea, even one's ideal, of law, and the positive legal material that is generally agreed to be relevant to answering the question. And this is why Dworkin's theory of adjudication is the kind of theory that will be articulated by one who wishes to make sense of the common law from the practitioner's perspective.¹⁴⁰

¹³⁹ For a fuller treatment of this issue, see David Dyzenhaus, *The Genealogy of Legal Positivism*, 24 *Oxford Journal of Legal Studies* 39 (2004).

¹⁴⁰ Notice that positivist judges, like Justice Antonin Scalia of the U.S. Supreme Court, are forced to adopt this practitioner's perspective. They work within the common law tradition but try to base their answers fully on an ideal of fidelity to law which holds that law consists of rules with determinate content, whose primary source is the legislature. See David Dyzenhaus, "The Unwritten Constitution and the Rule of Law" in Grant Huscroft and Ian Brodie, eds., *Constitutionalism in the Charter Era* (Butterworths, 2004), 383.

That perspective is built on a fiction, but fictions are not always or even often “childish.” They are often necessary to the maintenance of a practice – that is, they are regulative assumptions, assumptions participants in a practice must adopt in order to make the practice work. Of course, the practice itself might be pernicious, but then the move one has to make is to condemn the practice, not the fictions that sustain it. And conceptual legal positivists bar themselves from doing precisely that.

Hart recognized in the second edition of *The Concept of Law* that he had said “far too little . . . about the topic of adjudication.”¹⁴¹ But, as we have argued, if he had tried to say more, he would have found himself forced to side either with Bentham and argue that we should get rid of common law adjudication or with Dworkin and take up the task of elucidating the internal point of view of participants in the practice.¹⁴² Instead, he decided to stay perched on an allegedly conceptual claim about the nature of law. From this precarious perch the practice of judges giving reasons that they regard as both legal and fully determinative of their conclusions looks at best like an exercise in self-deception, and, at worst, like an exercise in deliberate deception of others. Hence, one is not required to try to make sense of the practice, let alone to wonder why it took so long for the judges to understand that they might be under a duty to engage in it.

It is somewhat ironic that Hart’s concept of law required that he debunk the self-understanding of participants in the practice of the common law. For one of Hart’s achievements is supposed to be his insistence that one has to take into account both the fact that legal order is an order composed of norms and that, consequently, one has to understand that the legal officials have an internal point of view about why they should apply the norms – that is, they are not motivated at all by fear of sanctions to obey commands.¹⁴³ It is more than somewhat ironic that it turns out that insofar as judges cannot understand the law in accordance with the command conception of authority, what they do outside that conception has to be considered to be not law. That is, conceptual legal positivism’s adoption of the command conception of authority relegates most of what judges do in deciding hard cases to the realm of the extra-legal.

¹⁴¹ Hart, *The Concept of Law*, 259.

¹⁴² The former strategy is followed by Jeremy Waldron, whose legal positivism is best understood as a (in our view entirely productive) return to Benthamite political positivism. It is telling that Waldron regards reason-giving as simply a report of the judge’s political convictions that motivate his “vote” about how best to decide a case, a claim which then allows him to argue that it is better to trust the wisdom of the votes of legislators – the representatives of the people. See Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999), 296–8. The latter strategy is adopted by incorporationist or inclusive legal positivists, who adopt in substance Dworkin’s account of the phenomenology of adjudication but say that such an account is contingent on the history of particular legal orders.

¹⁴³ See Hart, *The Concept of Law*, ch. 5 (“Law as the Union of Primary and Secondary Rules”).

Justification happens in extra-legal space and thus does not require the attention of legal philosophy.¹⁴⁴

But it is also curious that philosophers of law who have tried to make sense of the internal point of view of participants in the practices of the common law have failed to notice that an element they considered fundamental to the practice, the giving of reasons, was not regarded, at least until very recently, as a legally enforceable duty. In this respect, the common law romantics like Dworkin have failed to engage with legal practice and have thus assumed that all is working in accordance with their own ideal picture.

Had Dworkin argued that a coherent picture of the rule of law entails a duty to give reasons, *despite* the fact that the common law has failed to recognize such a duty and has thus for almost all of its history operated in significant respects with a command conception of authority, he would have been required to devote more attention to the questions raised by legal practice for his theory. He would then have had to notice four significant phenomena.

First, legislatures in the common law world have been far more active than judges in prompting a movement to recognize such a duty. Second, the duty, whether legislated or determined to exist as matter of common law, has been thought primarily to apply to decision makers other than judges, namely the officials of the administrative state. Third, and following from this last phenomenon, to require reasons from such officials is to imply that they have an important role in interpreting the law, a role that judges with others should respect as long as the officials do a decent job of justifying their decisions.¹⁴⁵ And it follows from these three phenomena that one might have to rethink Dworkin's idea of the judge as Hercules,¹⁴⁶ the omniscient and apparently omnipotent guardian of the rule of law, because both the legislature and public officials seem to have an important interpretative role in maintaining and advancing the rule of law.¹⁴⁷ In other words, common law romantics would have to get rid of their engrained prejudice against statutes¹⁴⁸ and, in addition, turn their

¹⁴⁴ See Samuel I. Shuman, *Justification of Judicial Decisions*, 59 California Law Review 715, 715–16 (1971); Summers, *Legal Institutions in Hart's Concept of Law*, 75 Notre Dame Law Review at 1807–11. The tensions that arise here recur in Joseph Raz's account of authority, where the conception of authority is the command conception but legal subjects are entitled to disobey the commands if they do not think these are justified. See Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press, 1994), ch. 10; Ronald Dworkin, *Thirty Years On*, 116 Harvard Law Review 1655 (2002). Dworkin not only criticizes each step in Raz's argument but points out that Raz's account of authority leads to two different and contradictory stances to authority: either almost complete deference or no deference at all.

¹⁴⁵ See David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (Hart Publishing, 1997), 279.

¹⁴⁶ See Dworkin, *Taking Rights Seriously*, 105.

¹⁴⁷ David Dyzenhaus presents a defense of this claim in *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006), ch. 3.

¹⁴⁸ See Roderick Munday, *The Common Lawyer's Philosophy of Legislation*, 14 Rechtsstheorie 19 (1983).

attention to the constitutional place of the administrative state in legal order. As Jerry Mashaw points out, the administrative state can appropriately be seen as “the institutional embodiment of the enlightenment project to substitute reason for the dark forces of culture, tradition, and myth.”¹⁴⁹

The fourth phenomenon also arises out of our discussion of the duty to give reasons. We have noted that to the extent that the common law continues to fail to recognize such a duty, it works to some extent within a positivist conception of authority, the command conception in which a decision is obeyed because of who gave it and not because it is justified by reasons. And we have also noted that there are serious arguments about problems that can arise if the reason-based conception of authority is thought applicable to all decisions that have the force of law.¹⁵⁰ In other words, even if one adopts, as we think one should, the reason-based conception as the basic conception of authority, it might be that that conception cannot by any means take up all the space of legal order, because it is often appropriate to have decisions made more in accordance with the command-based conception.¹⁵¹ Not only is it the case that generally speaking the validity of statutes is best understood in accordance with the command conception, but even the exercise of legal authority by those charged with implementing the statute might on occasion be better understood in terms of the command rather than the reason-based conception. It might, for example, be simply inappropriate to require written reasons for all official decisions, especially for the category of decisions that neither affect an important individual interest nor are based largely on legal considerations.¹⁵² But in making this concession, we need to emphasize our use of the word “more.” If the reason-based conception of authority is required by what we have described as the pull of justification, and that pull is the point of legal order and the rule of law, then the reason-based conception has to be the default conception of legal order. Hence, statutes that are technically valid will have at best a shaky claim to authority if officials are unable to exercise the authority delegated to them by the statute in a reason-based fashion, because the statute is in tension with the rule of law.

Perhaps we have to take refuge here in the last resort of the administrative lawyer and say that the reason-based conception and the command conception are the two poles of the continuum of authority but that the command conception pole is not to be approached too closely without compelling reasons. But even if we qualify our concession in that way, it is still a concession to

¹⁴⁹ Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *Fordham Law Review* 17, 26 (2001). Cf. Fuller, *Reason and Fiat in Case Law*, 59 *Harvard Law Review* at 392–5.

¹⁵⁰ See Roderick A. Macdonald and David Lametti, *Reasons for Decision in Administrative Law*, 3 *Canadian Journal of Administrative Law and Practice* 123 (1990).

¹⁵¹ See Fuller, *Reason and Fiat in Case Law*.

¹⁵² See Ho, *The Judicial Duty to Give Reasons*.

legal positivism, which gives rise to our concluding observation. Attention to practice will likely result not in victory for a particular approach to legal theory but rather in a rapprochement between common law romantics and political legal positivists.¹⁵³ Thus Lon Fuller was right to conclude that the antinomy of reason and fiat is “inescapable” – indeed, that any attempt to rid the common law of either was doomed to failure or positively dangerous for society.¹⁵⁴

¹⁵³ It might be that resources for this rapprochement will be found in a rediscovery of legal realism, a thought prompted by work-in-progress by Hanoch Dagan of Tel Aviv University. That is, while legal realism is often thought to be consistent with conceptual legal positivism because of positivism’s claim about judicial discretion, legal realists were committed to the view that legal theory had to take adjudication and legal reasoning seriously, as matters for investigation by philosophers of law. Dworkin’s account of law, as well as other coherentist accounts, e.g., Ernest J. Weinrib, *The Idea of Private Law* (Harvard University Press, 1995), might then seem like overreactions to the realist challenge, as long as one can establish that there is a middle ground of legality which frames judicial reasoning: a ground that is not as unconstrained as conceptual legal positivists think but not as constrained as Dworkin and Weinrib suppose. For discussion of the relationship between legal positivism and legal realism, see S. Livingstone, “Of the Core and the Penumbra: H. L. A. Hart and American Legal Realism” in Philip Leith and Peter Ingram, eds., *The Jurisprudence of Orthodoxy: Queen’s University Essays on H. L. A. Hart* (Routledge, 1988).

¹⁵⁴ Livingstone, “Of the Core and the Penumbra” in Leith and Ingram, *The Jurisprudence of Orthodoxy*, 381, 394–5.

COMMON LAW CONSTITUTIONALISM

Natural Law, Common Law, and the Constitution

JAMES R. STONER JR.

Nihil quod est contra rationem est licitum – “Nothing that is against reason is lawful” – was a favorite maxim of Sir Edward Coke, the seventeenth-century Englishman’s oracle of the common law and an authority still in colonial America on the eve of the Revolution.¹ In slightly different form, the maxim appeared in Coke’s report of *Doctor Bonham’s Case*, cited by James Otis in the 1761 Massachusetts *Writ of Assistance Case* that began the constitutional argument for Independence: “when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void.”² Alexander Hamilton references neither *Bonham’s Case* nor Otis’s argument in *Federalist* No. 78, where he develops the reasoning behind judicial review of legislation, nor is either of the cases mentioned in John Marshall’s opinion in *Marbury v. Madison*. But both insist on the power of courts to void legislation repugnant to the Constitution as a matter of simple logic: Hamilton writes of “the nature and reason of the thing,” and Marshall of the “theory . . . essentially attached to a written constitution.”³ There is little doubt that the recourse to “reasonableness” in the judicial evaluation of regulatory legislation in the nineteenth century draws upon the legacy of this now-ancient maxim, nor perhaps that the “rational relation” test of the twentieth century is a modification of that tradition, too.

While the kinship of law and reason can be traced from the account of kingship in the *Politics* of Aristotle and the discussion of “right reason” in

¹ Steve Sheppard, ed., *The Selected Writings of Sir Edward Coke* (vol. 2) (Liberty Fund, 2003), 701 (I Institutes 97b).

² *Dr. Bonham’s Case*, (1610) 8 Co. Rep. 107a, 118a, 77 Eng. Rep. 638, 652, quoted in *Paxton’s Case* (the *Writs of Assistance Case*), which is found in Josiah Quincy, Jr., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay between 1761 and 1772* (Little, Brown and Co., 1865), 51. For a fuller discussion of these cases, see my *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (University Press of Kansas, 1992), ch. 3, and 236 n.4.

³ Alexander Hamilton, James Madison, and John Jay, *The Federalist* (Jacob E. Cooke, ed.) (Wesleyan University Press, 1961), 526; *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

the writings of Cicero, critics and skeptics have their own, contrary tradition. Rarely has their point been made more effectively than by the seventeenth-century political philosopher Thomas Hobbes:

when men that think themselves wiser than all others, clamor and demand right Reason for judge; yet seek no more, but that all things should be determined, by no other mens reason but their own, it is as intolerable in the society of men, as it is in play after trump is turned, to use for trump on every occasion that suite whereof they have the most in their hand. For they do nothing els, that will have every of their passions, as it comes to bear sway in them, to be taken for right Reason, and that in their own controversies: bewraying their want of right Reason, by the claym they lay to it.⁴

Because human reason is fallible, or at any rate because men reason differently, to equate law and reason in theory is in practice to yield to the arbitrary will of the judge. Hobbes was a founder of legal positivism – he defined law as the command of the sovereign – and the aim of Hobbes’s positivism was to settle the law in a written text or in an institution with lawmaking power, better to ensure legal certainty and to prevent the injustice that attends an arbitrary judge.

Now the maxim that nothing that is against reason is lawful might be called the natural law moment in the common law or, if you prefer, in the law of common law countries or legal systems. For natural law is the law of reason; its various proponents, stoic, scholastic, and modern, agree on that much, though their formulas differ. Thomas Aquinas treats natural law as one of the four basic forms of law known to men – eternal law, natural law, human law, and divine law – and writes that it is known to human reason as reason reflects on the goods to which human nature is inclined.⁵ Hugo Grotius provided a classic formula for the world of the seventeenth century:

The law of nature is a dictate of right reason, pointing out that an act, according as it is fitting or unfitting to rational nature, has in it a quality of moral turpitude or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.⁶

Hobbes used the term “law of nature” and in fact devised a catalogue of some twenty such laws, but he admitted that, strictly speaking, these were “dictates of reason,” not natural duties but “theorems concerning what conduceth to the conservation and defence of themselves.”⁷ Whether Locke followed Hobbes

⁴ Thomas Hobbes, *Leviathan* (C. B. Macpherson, ed.) (Penguin, 1968), ch. 5, 111–12.

⁵ Thomas Aquinas, *Summa Theologica*, I–II, q. 91, 94, in Thomas Aquinas, *On Law, Morality, and Politics* (William P. Baumgarth and Richard J. Regan, S. J., ed.) (Hackett Publishing Co., 1988).

⁶ *De Jure Belli ac Pacis*, I, c. i., sec. 10, paras. 1, 2, quoted in John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980), 44.

⁷ Hobbes, *Leviathan*, ch. 15, 217.

or Grotius is a matter of some scholarly dispute; he wrote of the law of nature simply that “reason . . . is that law.”⁸

In this chapter, I elaborate upon the points just introduced, beginning with the common law, turning then to the Constitution, then considering natural law jurisprudence in its contemporary forms. In conclusion I will turn from this necessarily abstract discussion to the contemporary debate over whether the law ought to recognize same-sex marriage. Opponents of same-sex marriage have objected strenuously to the role courts are playing in its legal recognition – and rightly so, for if fundamental change in a fundamental social institution can be decreed by unelected courts without legislative action, then it hardly seems that our governments are democratic, except in secondary matters or, for the time being, in matters pertaining to international affairs. At the same time, in treating the question of gay marriage as a matter to be settled by reason, judges are drawing upon a long-established tradition in Anglo-American legal thought. That they are able to turn tradition against itself, or one tradition against another, is some measure of the confusion that has arisen in modern law – as common law has been detached from its roots in custom, natural law from its anchor in nature, and the Constitution from the act of ordaining and establishing by the people as a whole.

Common Law

As I have written on common law as it relates to American constitutionalism elsewhere at some length,⁹ allow me here a summary exposition. The common law is the unwritten law of England, carried over by the English colonists to North America and made the basis of much of the law of the states. Though it came to be redefined by Justice Oliver Wendell Holmes Jr. and the tradition of legal realism he helped initiate as “judge-made law,” that was not part of its original understanding at the time of American independence or the writing of the Constitution. As William Blackstone – whose *Commentaries on the Law of England* soon enough became the standard American authority on common law – made clear, the doctrine of the law was that the decisions of the courts gave evidence of what the law is, but they did not create the law; the root of common law, instead, was ancient custom, custom so long established that “the memory of man runneth not to the contrary.”¹⁰ Common law was not the only form of law in England – there were separate courts for Admiralty and for

⁸ John Locke, *Two Treatises of Government* (Peter Laslett, ed.) (Cambridge University Press, 1988), II, sec. 6, 271.

⁹ Stoner, *Common Law and Liberal Theory and Common-Law Liberty: Rethinking American Constitutionalism* (University Press of Kansas, 2003), esp. ch. 1.

¹⁰ William Blackstone, *Commentaries on the Laws of England* (vol. 1) (Oxford University Press, 1765), 68–70.

ecclesiastical law, the Chancellor had a court of equity to resolve matters where the commands of common law worked an injustice, and Parliamentary statute had come into its own as a form of law – and so common law could not assert a claim to comprehensiveness. It was concerned above all with the law of property, especially property in land, and criminal law was also within its jurisdiction – actually, the two royal common law courts, the Court of Common Pleas and the King’s Bench, had jurisdiction of land law and criminal law, respectively – and the centrality of common law reflected in part the central importance of the people’s land and the king’s peace. By the seventeenth century and through the eighteenth, the common law was central to the law of England. Blackstone wrote that the first step in interpreting even a parliamentary statute was to determine whether it simply declared the common law – put it in writing, so to speak – or whether it remedied some mischief that had arisen or been recognized in the common law.¹¹

Still today a common law jurisdiction is defined as one where precedent has the force of law. This was true in the early days as well, though it bears repeating that precedents then were thought not to have introduced new law but to have given evidence of what the law was understood to be. The maxim quoted at the outset – that nothing that is against reason is lawful – figures in the story of precedent, for it was assumed that a precedent that ran against reason need not be followed. When a common lawyer like Coke spoke of rooting out what went against reason from the common law, he meant resolving contradictions, ensuring a general consistency in the law. This was not done by trying to squeeze the whole of the law into a single theory or a few general principles; the common law was multifarious in its rules and concerns and even in its many maxims, the closest thing to modern principles that one finds in the classic common law. Instead, when a new case arose that brought to light an inconsistency in the law, or a conflict between some legal instrument and a basic legal maxim, the judges had to settle the matter afresh, bringing to bear upon the question their own best judgment, formed through long study of previous cases and perhaps also long experience on the bench – and probably, too, in legal practice, for the common law bench was drawn from the bar. Hence Coke could assert confidently of the common law, in explanation of the maxim that the law contained nothing against reason, that:

reason is the life of the Law, nay the common Law itself is nothing else but reason, which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every mans naturall reason, for, *Nemo nascitur*

¹¹ Blackstone, *Commentaries*, 86–7. Useful for understanding the importance of property rights in common law – especially as conveyed to American constitutional law through the Due Process clauses – are John V. Orth, *Due Process of Law: A Brief History* (University Press of Kansas, 2003) and James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford University Press, 1991).

artifex [No one is born an artificer]. This legall reason, *est summa ratio* [is the highest reason]. And therefore if all the reason that is dispersed into so many severall heads were united into one, yet could he not make such a Law as the Law of England is, because by so many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this Realme, as the old rule may be justly verified of it, *Neminem oportet esse sapientiores legibus*: No man (out of his owne private reason) ought to be wiser than the Law, which is the perfection of reason.¹²

A few things more ought to be said to conclude this brief survey of common law as it was understood at the time of the American founding. First, as characteristic of common law as drawing the bench from the bar and treating precedent as valid law was the institution of the jury. Indeed, Hobbes, a thoroughgoing critic of common law, writes as though many of his opponents simply equated common law with trial by jury, because this was the typical way of proceeding in common law courts.¹³ It takes only a moment's reflection to see how trial by jury fits perfectly into a system of unwritten, customary law; what better measure is there than the unanimous verdict of "twelve good men and true" drawn from the community of that community's sense of right and wrong?

Next, though common law was administered by secular courts, it arose in a Christian culture, counting egregious sins among its crimes, acknowledging a moral order defined by Christian teaching, recognizing among its privileges the distinctively Christian respect accorded individual conscience, and taking its spirit from the Christian doctrine of free will. Sometimes the relation of common law and Christianity seems in retrospect obvious and organic – Sundays were a day of rest at common law, because the courts were closed, and so Sunday contracts were presumed invalid – and sometimes the common law judges jealously guarded their jurisdiction and their distinctive rules against church pressure. James Madison argued in his *Virginia Report of 1800* that the fact of an established church in England was an argument against reception of the common law in the United States, but on this point both Thomas Jefferson and Joseph Story disagreed, because they found adequate protection in the fact that the application of common law in America always included the caveat, insofar as not inconsistent with our institutions or unchanged by legislation here. On whether Chief Justice Matthew Hale's maxim that "Christianity is a part of the common law" applied in America, Jefferson and Story were altogether at odds.¹⁴

¹² Sheppard, *Selected Writings of Sir Edward Coke* (vol. 2), 701 (I *Institutes* 97b).

¹³ Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (Joseph Cropsey, ed.) (University of Chicago Press, 1971), 70.

¹⁴ I discuss these matters at greater length, and provide citations, in "Christianity, the Common Law, and the Constitution" in Gary L. Gregg II, ed., *Vital Remnants: America's Founding and the Western Tradition* (ISI Books, 1999), 175–209. For a recent study that looks at the roots of common law in medieval theology, see David VanDrunen, *Law and Custom: The Thought of Thomas Aquinas and the Future of the Common Law* (Peter Lang, 2003).

Finally, England's famously unwritten constitution, which seems such an oddity to the modern world, makes perfect sense when seen in the light of the common law culture in which it took form. Strictly speaking, the law of Parliament was not a part of common law – the common law courts had no jurisdiction over it, though Parliament itself was called a “high Court” – and the king's prerogatives were, said Coke, better not disputed, in common law or Parliament. Still, the English parliamentarians – at least until devising the doctrine of the sovereignty of Parliament in the eighteenth century, a doctrine that played no little role in the estrangement of the American colonies – made their appeal to ancient, unwritten privileges, and to written ones, too, for the Magna Charta was held by Coke and his cohorts to declare in writing ancient privileges at common law, not least in the “law of the land” clause of its twenty-ninth chapter, which Coke translated as meaning equivalently “due process of law.”¹⁵

Constitution

Now there can be no doubt that when the American founders settled upon written constitutions, they meant to remedy a defect they saw in the constitutional tradition they inherited. Unwritten constitutions left the distribution of power in government too ambiguous, and the limits on government too nebulous, for liberty to be secure. Nor am I ready to deny that the liberal political philosophy of the state of nature, the creation of government, and the right of revolution played a role in our declaration of independence from England and the making of our first constitutions: The language of Jefferson's Declaration clearly draws on Locke, and mention of the theory of the state of nature is made from time to time in political settings. But a purely liberal interpretation of the Founding would be profoundly mistaken. In the first place, the Declaration is infinitely clearer than Locke that men's inalienable rights – the first principles of political reasoning – are an “endow[ment] by their Creator,” who is mentioned also as the providence who will protect their enterprise and the supreme judge who will hold them to account.

Second, when Congress turns in the Declaration to give concrete meaning to the charge of “tyranny,” “absolute despotism,” and “usurpation” against the British king, the proofs almost all make reference to presumed tenets and practices of Anglo-American constitutionalism that the king and “others” (i.e., Parliament) have transgressed – even to the point of mentioning, in the very middle of the document, “our constitution,” which can have no other referent at the time but an unwritten one.

Third, when the Constitution is written a decade or so later, specific provision is made to guard against nearly every specific abuse that was named in the

¹⁵ Sheppard, *Selected Writings of Sir Edward Coke* (vol. 2), 858 (II Institutes 50).

Declaration, which I think reveals the extent to which the Framers saw even the new institutions they were inventing in the light of a constitutional tradition they inherited rather than created from whole cloth. They used technical common law language in the Constitution, after all, and when they write of the “judicial power” they seem to take for granted a judiciary of the common law type.¹⁶ Moreover, in adding the Bill of Rights, they gave written constitutional status to numerous common law privileges and immunities, summed up in the phrase “due process of law.” What can be said at the federal level – where the institutions were for the most part brand new – can be said more emphatically at the level of the states, where royal governors were replaced by elected ones and their councils reconstituted into upper legislative chambers, but where government otherwise was continued and existing common law was generally adopted. Not even whole governments, but only binding ties between governments, were dissolved or reconstituted by the American Revolution; there was no return to a Hobbesian state of nature that would have absolved men of their family ties and undermined their estates.

The innovations of the Constitution – the separation of powers, especially when seen as a device to make “ambition counteract ambition,” and the extended republic, with its new kind of federalism in which the central power is also a republican government, not a council of states, and is charged with the limited aims of ensuring protection and peace and prosperity – are real innovations, and I do not think that the role of liberal political theory in their conception can be countermanded. But I also think that, from the perspective of common law, these innovations are precisely a moment when reason intervenes to reform the legal order without replacing it. That means, *inter alia*, that constitutional interpretation must keep account of the common law context in which the Constitution was written and adopted to be true to the original understanding of the regime. Starting from the text of a statute and turning to the intention of the lawgiver when the text is uncertain are rules for the interpretation of statutes by common law courts – Blackstone mentions them both¹⁷ – and it makes sense, conceiving of a written constitution as a fundamental statute, to bring these practices to bear upon constitutional interpretation, as of course judges long have done. But textualism and originalism as theories of constitutional interpretation need to be integrated with an awareness of the common law character of our original constitutionalism.¹⁸ If proponents of these approaches detach the forms and processes of government that the Founders invented from the living moral context in which the reforms were made, the constitutional

¹⁶ Consider the discussion of “strict rules and precedents” and the assumption that judges will be elevated to the bench from “a lucrative line of practice” in *The Federalist*, No. 78.

¹⁷ Blackstone, *Commentaries*, 59 ff.

¹⁸ See Diarmuid F. O’Scannlain, *Rediscovering the Common Law*, 79 Notre Dame Law Review 755 (2004).

system appears as a machine for indeterminate purpose and its moral authority is lost. The Constitution was designed as an instrument of government, and its originators had in mind something new in the world, but their project was also restorative: to give liberty and virtue a better home.

How will the foregoing reflections about the Constitution and the common law fare with the modern-day constitutional liberal? To be sure, modern liberals have used Holmes's redefinition of common law as judge-made law to facilitate a bold program of innovation in the interpretation of the Constitution's most sweeping clauses – Due Process and Equal Protection – and they share the liberal spirit of those in the nineteenth century, and even some in the eighteenth, who thought that human beings could “cast off natural limitations” in the pursuit of freer and more equal ways of life. But the same liberals who would use the processes of common law decision making to develop the law in new directions despite the lag in popular support typically have little patience with the traditional common law, which they see as oppressive and irrational.¹⁹ Again, my point is not to deny that there is a liberal moment in the American founding; much less would I deny that subsequent political developments – universal suffrage, the end of slavery, the rise of capitalism, the emancipation of women, the building of the modern national regulatory and welfare state, and the reinterpretation of rights on liberal principles – have pulled the polity in a liberal direction. But I do think that the resources of liberalism are inadequate to all of today's challenges and that liberalism has never given an adequate account of either the human person or our constitutional order. This brings me to the question of natural law.

Natural Law

Natural law, or at any rate something called “natural law,” has figured now and again in American constitutional law. In his one dissenting opinion, in a case involving insolvency and bankruptcy, Chief Justice John Marshall makes mention of the state of nature and the rights that arise within it; in his dissent in *The Slaughter-House Cases*, Justice Stephen Field refers to “the natural right of every Englishman” to practice a lawful trade without state interference.²⁰ The jurisprudence of “natural law–due process” suggested by these early dissents may have influenced the Court's decision in *Lochner v. New York*, but it was eventually rejected by the Court and discredited in most academic circles, though several recent studies have suggested that the bad reputation given to

¹⁹ For example, see the disparaging reference to the common law of marriage and family in *Planned Parenthood v. Casey*, 505 U.S. 833, 896–898 (1992); cf. the praise for and quotation of Justice Harlan's common law reasoning in *Poe v. Ullman* in *Casey*, 505 U.S. at 849–50.

²⁰ *Ogden v. Saunders*, 25 U.S. 213, 345 (1827) (Marshall, C.J., dissenting); *Slaughter-House Cases*, 83 U.S. 36, 104 (1873).

the *laissez-faire* judges by the Progressive reformers was undeserved.²¹ It is certainly an irony of no small proportion that one of the same clauses used by the *laissez-faire* natural lawyers – the Due Process clause of the Fifth and Fourteenth Amendments – now does service as the constitutional anchor for a very different line of jurisprudence that, while rarely calling itself natural law, nevertheless brings to the interpretation of the Constitution philosophical arguments in defense of absolute individual rights. For example, Ronald Dworkin has for thirty years defended a jurisprudence that would involve judges in developing theories of constitutional law – based, he says, on the principle of equality of concern and respect – that would justify their striking down as unconstitutional statutes and any other legal instruments that block an extensive array of individual claims against government power in order to promote expanded self-expression and lifestyle choice.²²

Dworkin's project has often been linked with the political philosophy of John Rawls, who, more abstractly, at least from the point of view of American constitutional law, developed a liberal theory of justice that curtailed the reach of public authority to securing certain basic goods to all on an equal basis, while leaving to individuals the right to define and pursue their own good in their own way.²³ In classic liberal fashion, but to an end and with means somewhat at odds with classical liberalism, both Rawls and Dworkin defend extensive government power to ensure limited ends: Individual rights, especially rights to live as one pleases without regard to traditional morality and maybe especially in defiance of it, are given absolute status and government support, while advocacy for other ends is censored in the name of "public reason." On questions as disparate as abortion rights and free expression, their theories, or at any rate their conclusions, seem to dominate the opinion of the bar and probably also the bench today.

About a decade after the publication of Rawls's *Theory of Justice*, and only a few years after the publication of Dworkin's *Taking Rights Seriously*, John Finnis published *Natural Law and Natural Rights*.²⁴ Like Rawls and Dworkin, Finnis writes in the tradition of analytic philosophy; like Rawls he develops a comprehensive theory of justice, and like Dworkin he directs his jurisprudence in response to H. L. A. Hart's *The Concept of Law*.²⁵ Hart's book had been designed to offer a defense of modern constitutionalism on positivist grounds, on

²¹ *Lochner v. New York*, 198 U.S. 45 (1905); Benjamin Wright, *American Interpretations of Natural Law* (Russell and Russell, 1931). Cf. Michael Les Benedict, *Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 Law and History Review 293 (1985) and Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (Princeton University Press, 1994).

²² Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), and others.

²³ John Rawls, *A Theory of Justice* (Harvard University Press, 1971); see also John Rawls, *Political Liberalism* (Columbia University Press, 2005), esp. Lecture VI.

²⁴ See note 6.

²⁵ H. L. A. Hart, *The Concept of Law* (2nd ed.) (Oxford University Press, 1994).

the one hand not violating modern relativism by restricting law to a substantive order, on the other not succumbing to the error of defending law in a way that justified the legality of totalitarian dictatorships. Hart's innovation was the concept of a "rule of recognition," a "second-order" rule by which society agrees upon the processes that would establish its primary rules, or agrees at least on what evidence would count to establish the validity of primary rules of behavior. To simplify, while Rawls and Dworkin turned from relativism and positivism to Kantian transcendentalism or constructivism, Finnis turned instead to the natural law theory of Thomas Aquinas.

Like Rawls and Dworkin – indeed, like Hart and the British philosophical tradition for a couple of centuries – Finnis accepts that one cannot derive an "ought" from an "is," a statement about how we ought to live, for example, from an account of what our natures are. The is/ought distinction had been thought fatal to natural law thinking, and Finnis agrees that to accounts of natural law presented in the form he quotes from Grotius (and I quoted from him) it is. But he denies that Aquinas's theory of natural law, much less the approach in Aristotle's *Ethics*, is based on a freestanding account of human nature that men are then obliged – perhaps as a result of God's command – to fulfill. Instead, Aristotle and Aquinas begin from the direct experience of good by practical men, which is to say, from the universal human experience of what is self-evidently good or conducive to human happiness. Not a theory of human nature but experience in living a human life is the beginning of ethical reflection; the norms of practical reasonableness – for we experience both our need and our ability to reason about what is good – are what Finnis means (and says Aquinas means) by "natural law."

What I want to suggest is that, if the common law dimension of our constitutionalism makes it inevitable that parties and their lawyers will demand reasons for our basic legal institutions and so will necessarily involve judges' giving a rational defense of any rule of law – or failing to see the way to such a defense, setting the rule aside – then Finnis's theory is at least as eligible as Rawls's or Dworkin's for the purpose, and indeed may be more so, as Finnis is attuned more clearly than Rawls and even than Dworkin to the distinctive way of reasoning at common law, though he gives it no special privilege. Moreover, there is room in Finnis's theory, as there is not so clearly in Rawls's and is clearly not in Dworkin's, for fundamental decisions about constitutional principles to be made not by courts but by the people, whether through ordinary legislative channels or by extraordinary constitutional means. Despite its Thomistic provenance – he might say, because of it – Finnis's theory shares much with modern liberalism: He starts from the individual's good or, better, the individual's understanding of his own good; he accepts and develops the language of human rights; he refuses to posit any separate real existence of organic communities as distinct from the real individuals whose association forms them; he endorses a focus on individual self-development and adopts Rawls's language

of the individual's "life-plan." He even means for his theory to be descriptive or empirical – that is, to be an authentic account of how people in modern society really experience and think about the moral life – and to have the advantage over Rawls's of not relying on devices like the "original position" or the "veil of ignorance." Let me present what he says in a thumbnail sketch.

Finnis begins, I said, from what people find to be practically good. In Aristotelian fashion, he makes a list (though of course in the book he elaborates at greater length than I will here): The basic forms of human good, or basic human values, are life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness itself, and religion. He leaves the particular definitions of most of these quite open, reasoning that different people and different societies will define and pursue each good in different forms or by different ways; there are many things that can be known, many different games to play, even or especially many ways of approaching the good of religion, including the atheist's (he says, even Sartre's) elevation of human freedom in the absence of God. Without offering a metaphysical or natural account defending the accuracy of his list – he explains that Aquinas's attempt to do so led to misunderstanding – Finnis insists nonetheless that all other human goods can be reduced to one of these or to a means to one or more of these. For example, he says of human sexuality that it can be analyzed in relation to life, play, and friendship; of the family, he would analyze its various activities, responsibilities, and aims.²⁶ Do you think there are others, Finnis asks? Go ahead and make your case.

Now the account of human goods he gives is meant to be pre-moral; these are simply the things that individuals recognize as self-evidently good, not because convention says so but because they make us happy. Morality emerges in the working out of what he means by practical reasonableness. Here he says we recognize nine requirements, which again I will simply list: that we have a coherent plan for our life; that we take all seven of the basic values into account in our life, without exaggerating the importance of one or another or leaving one or another out; that we show no arbitrary preference among persons, though there is a reasonable scope for self-preference, because one's own good is most directly one's concern and in one's power; that we keep sufficient detachment from our projects so as not to feel ruined if one fails; that we nevertheless make sufficient commitment to our projects to see them through; that we work efficiently in bringing about the good; that we choose no act that intends to damage a good; that we favor the common good; and that we act according to our conscience.²⁷ Again Finnis's emphasis is on the plurality of these principles, as it was on the plurality of goods; for example, the unreasonableness of utilitarianism is to take efficiency as though it were the only rule of practical reason. Nor, he insists, is there an algorithm that fits these

²⁶ Finnis, *Natural Law and Natural Rights*, 86–90.

²⁷ Finnis, *Natural Law and Natural Rights*, 103–26.

various principles into a single system for action. To follow these principles is what we mean by being moral – again, if you disagree, make the case as to why – but it is obvious that, as there is ample room for choice of goods, so reflection and choice are inevitable if one is to act in a practically reasonable way. Are there people so impervious to the good as to be wantonly cruel, or so perverse as to insist on acting in disregard for these norms of practical reasonableness? Of course, says Finnis, but his theory takes its bearings, if not from the best case simply, from the case of the human being – like Aristotle’s *spoudaios* – whom one looks up to and respects. Finnis will reason, not from the extreme case, like Hobbes or Machiavelli, or toward an “ideal theory,” like Rawls, but simply from the “central case,” a model that is at once to be admired but not remote.

With this basic framework, Finnis proceeds to treat the basic issues of jurisprudence. He provides in his list of goods the basis for consideration of the common good, which he would allow each community to define and develop for itself – with the understanding that individuals can be members of multiple, overlapping communities. The substance of the common good of each community is its justice, and Finnis follows Aristotle in analyzing justice as distributive and commutative. “The modern grammar of rights provides a way of expressing virtually all the requirements of practical reasonableness,” he argues, and then shows against Dworkin that any claim for “equal concern and respect” can be countered “by postulating an entitlement of every member of a community to a milieu that will support rather than hinder his own pursuit of good and the well-being of his children, or an entitlement of each to be rescued from his own folly.”²⁸ Authority in a community belongs to “those who can in fact effectively settle co-ordination problems for that community,”²⁹ but this stark doctrine is mollified later on by admission that a ruler has no right to be obeyed beyond his service to the common good, except to avoid scandal. Law reproduces in its own way the whole of morality for a community, determining by public choice what abstract principles leave unspecified and thus creating obligations on the individual members to obey the law for its own sake. Finally, though Finnis considers his system complete and adequate on human terms alone, he recognizes that many think – he himself thinks – that the human good takes on its full meaning only in the light of transcendent meaning, even in the life of a single individual, and he lays out the case for seeing one’s highest good in friendship with God (or “D,” the uncaused cause) and understanding life itself as a play of God’s game.

What does this theory do for American constitutionalism? It offers, I think, a vocabulary that can go head-to-head with Rawlsian liberalism, that can speak of the common good without embarrassment and formulate an individual-rights defense of laws known to be good in the face of rights claims that seem

²⁸ Finnis, *Natural Law and Natural Rights*, 98, 222.

²⁹ Finnis, *Natural Law and Natural Rights*, 246.

otherwise to further unravel social cohesion and a truly common life. It does this without linguistic moves that deny the real individualism characteristic of our society and reflected in our language of rights – but also without seeing in that individualism a cause for despair. It forces its advocate to develop arguments without recourse to God or religion, but it emphatically allows him to believe and to live as a believer. It provides arguments that ought to work in any court where Rawls is mooted – but it leaves ample room for a polity to settle its fundamental issues in other forums, and maybe even encourages that this be done.

Conclusion

I promised in conclusion a reflection on what all this might mean for the current debate over gay marriage. What is remarkable is that, despite his language of natural law and the known affinity of the author and his students for Catholic moral teaching, the theory of *Natural Law and Natural Rights* – written, of course, before same-sex marriage ever appeared as a topic of public debate, much less as a constitutional imposition – seems successfully to leave the issue to be debated, providing only the principles for adequately thinking the matter through. After all, by eschewing the traditional natural law reference to human nature – at least Aquinas's sorting of the precepts of natural law according to what we share with all living things, what we share with the animals, and what is distinctively ours – Finnis deprived himself and those who would follow his lead of any peremptory advantage that might follow from the facts of human biology viewed from a scientific or metaphysical point of view. One must start, instead, from the human experience of sexuality and rediscover the good of marriage through practical reasoning.

In published works written since *Natural Law and Natural Rights*, Finnis has done exactly that, in fact revising his theory to include marriage as a basic human good.³⁰ He takes biology into account, but in an integral way: Human beings are not to be understood as detached selves that merely inhabit and use their bodies but rather as embodied persons whose actions accord with their reasons, so human sexuality is not biological apart from moral. Marriage, and especially the marital act itself, is explained in terms both of its procreative potential and its expression of the fidelity of the spouses, the union of bodies as an actualization of a union of lives. With great subtlety and through a close analysis of Aquinas's writings, Finnis shows how even sexual relations between spouses can be immoral if the intentions of the couple are not right; his point,

³⁰ See, e.g., John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 *American Journal of Jurisprudence* 97 (1997); John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998), 143–54.

of course, is not thereby to call into question the legal standing of marriage but to argue that true marriage alone deserves the protection and endorsement of law.

What Finnis's willingness to make the philosophical case for traditional marriage denies to the advocate of same-sex marriage is what has become, as a result of decisions of the U.S. Supreme Court, his unfair advantage: a claim to be able to make his case solely as a matter of right, and to treat his opponent as enthralled by irrational "animus."³¹ In a way, it was a happy accident that Finnis left marriage off the list of basic goods in *Natural Law and Natural Rights*, for it allows his readers even now to watch, to follow along, so to speak, as he returns marriage to its proper place – precisely the challenge supporters of traditional marriage face in America today, as they witness the pressures against it in the courts of law and the legal culture. Reasoning at common law begins with tradition as the baseline, and in the absence of contrary reasons the common lawyer will reiterate tradition, or, in other words, allow precedent to govern the case. But because at common law there is no rule without a reason, traditions, too, must give account of why they are good, not merely old. Whether that account is given in court, in a legislature, or to the public at large is secondary; unlike the modern positivist, the old common lawyer was more interested in what the law is than where it came from. Whatever its source, it could be asked to stand before the bar of reason, albeit reason not disabled from asking about, and caring for, the human good. Common law today cannot assert mere prejudice as a reason. But it can and ought to look for reason from whatever source derived.

³¹ *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting). See also *Lawrence v. Texas*, 539 U.S. 558, 574, 583 (2003) (citing *Romer*, 517 U.S. at 634).

Text, Context, and Constitution

The Common Law as Public Reason

T. R. S. ALLAN

I. Introduction

In anglophone legal systems, the common law provides a constitutional foundation for legitimate government. It embodies a tradition of governmental compliance with the rule of law, subjecting official decisions and actions to independent judicial scrutiny. The evolution of common law principle, prompted by changing moral attitudes within society at large, provides for the adaptation of traditional values to present conditions. It enables the abstract clauses of a “written” constitution to acquire new meaning and gives an “unwritten” constitution its principal legal content. In performing such important tasks, moreover, the common law presupposes a distinctive vision of liberal democracy: It aspires to nurture and sustain a coherent constitutional morality, reflecting widely shared commitments to a fundamental ideal of equal justice. In a common law legal order, authoritative texts – whatever their formal status – are interpreted as elements of that larger constitutional design. Their true meaning and legal consequences are always matters of conscientious moral judgment, undertaken within the context of a strong legal tradition: The exercise of power is everywhere subject to moral scrutiny and the standing requirement of reasoned justification.¹

In the context of a common law rule, the notion of legal “validity” is largely redundant. The rule announced by the court in an earlier case may be *relevant* to the current inquiry, yet have little or no force. Its force and scope depend on its *justification*, judged in the light of present circumstances: Its coherence with current doctrine, on the one hand, and its conformity to prevailing moral and social standards, on the other, jointly determine its fate as a criterion of

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¹ For an exploration of these themes, see T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001).

decision making.² It is less obvious, but equally true, that a statutory rule may be *formally* valid but exert little real influence. The definitive text, if based on mistaken assumptions or doubtful wisdom, may be granted binding force within only a narrowly restricted sphere; and though its democratic credentials are clearly pertinent to the legitimacy of such a mode of construction, they do not simply override every other relevant dimension of political morality. It is (I shall argue) always a matter of judgment and degree; and the older the statute, the weaker (other things being equal) its claim – or the claim of an earlier reading – to *substantive* authority. A legislative rule, like the body of common law rules that surround it and so partly determine its meaning, must evolve in response to altered social conditions, even while the canonical text remains inviolate.

Because reason is sovereign over will, a legislative enactment can amend the law only as far as its stipulations make good sense to those it addresses. Legislative supremacy must be understood as a largely *formal* doctrine, marking the right of elected representatives to participate in the adaptation of the law to new demands; for the meaning and scope of the authoritative text that expresses their intentions will reflect its rational strength as a contribution to justice in the circumstances arising. A common law judge submits to a legislative command, just as he acknowledges a binding precedent, only insofar as he can view its requirements as an intelligible contribution to a larger common reason that he honors and respects. The legislative intentions he discerns (or infers) depend, in part, on those principles of justice he takes to be both morally correct and widely shared.³ The interpretation of formally enacted texts is as important a part of the larger political discourse, throughout society at large, as are the legislative deliberations that precede enactment: The judge is as much the guardian of the public morality as the servant of his current legislative masters. Statute and precedent alike prove opaque or indeterminate whenever that morality is potentially threatened; and the “law” that governs the particular case, in all its moral complexity, cannot therefore be simply *identified* with either. The public morality (or public reason) is the major part of what, in context, the “laws” established truly mean.

II. Common Law and Statute

The rule of law seeks an appropriate accommodation, according to context, between the competing ideals of legality and equity.⁴ The former ideal specifies in advance the factors pertinent to correct legal decision making; deductive

² Cf. Melvin Aron Eisenberg, *The Nature of the Common Law* (Harvard University Press, 1988), 151–4.

³ See T. R. S. Allan, *Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority*, 63 *Cambridge Law Journal* 685 (2004).

⁴ See J. R. Lucas, *The Principles of Politics* (Oxford University Press, 1966), 133–43.

reasoning is its characteristic feature. The latter is more purely rational, taking all relevant aspects of the case into account, as judged *ex post facto*. These ideals are embodied in the distinctive processes of legislation and adjudication, when regarded as antithetical modes of governance; but in practice there must be a suitable reconciliation between the two. Without the discipline of rules, readily ascertained and consistently applied, legal certainty is undermined; but the rigid application of rules to cases where the context makes it inappropriate threatens the essential connection between law and justice. The chief virtue of common law constitutionalism is its ability to find the correct path between the rival horrors of rule formalism and arbitrary, *ad hoc* decision making. Rules may be acknowledged and applied, but only within the limits of reasonableness, as judged by widely accepted principles of justice and settled expectation and tradition.

At first impression, the distinction between statute and common law may appear to entrench the division between competing ideals, leading in turn to the need for sharply differentiated styles of adjudication, according to the source of law involved. Enacted rules can enable us to ascertain most clearly what is lawfully required or permitted or prohibited: The canonical text reduces, even if it cannot eliminate, the scope for argument. Common law adjudication, by contrast, is more characteristic of equity: It permits a decision closely attuned to the particular circumstances, leaving wide discretion to the judge in making his appraisal. His justification for the selection of the relevant factors from an indefinite number of possibilities is given in retrospect. A weaker principle of universalizability operates: Like cases should be treated alike. But these distinctions can be overdrawn. In practice, the meaning of statutes depends on their correct interpretation, which reintroduces many, if not all, of the varied considerations that inform particularistic decision making. And the doctrine of *stare decisis* normally ensures that common law rules possess a genuine, if limited, independence of their underlying justifications.

When the ordinary common law is viewed as the ultimate basis of legitimate governance, law and justice operate in harness, according to the demands of the particular case. The available arguments for following or distinguishing or overturning⁵ the precedent case – or the rule it is understood to exemplify – are made directly pertinent to the court's decision. The wisdom or justice of adherence to existing rules is therefore a judgment *internal* to the adjudicative process, rather than merely a standard of external criticism: Central to the question of rule application is a skeptical probing and newly formulated articulation of the rule itself.

Even when the principle of *stare decisis* applies, the authority of the precedent depends on a subsequent account of its proper explanation and justification and, hence, of its relevance (or otherwise) to present circumstances. Although

⁵ See Eisenberg, *The Nature of the Common Law*, ch. 7.

the terms of an earlier judgment will normally reveal its original grounds, as they were understood by its author; they cannot bind a later court if, in the light of subsequent events or developing doctrine, a better (more persuasive) explanation of the decision can now be given. The overall coherence or reasoned consistency for which the legal order strives is mainly a present, rather than historical, virtue: The rule of law means an order of just governance, according to criteria of justice that can be defended today to inhabitants of the contemporary world. Legal rules must be congruent with prevailing social and moral standards as well as meet requirements of doctrinal consistency.⁶

When *stare decisis* is strictly followed, the result in the precedent case must be accepted even if its rationale remains controversial; and the further the departure of any new explanation from the reasons originally given for the decision, the higher the burden of justification. New explanations that unsettle previous understandings must make up, in the force of their contribution to justice, for the disservice they do the value of legal certainty. For higher courts, at liberty (under certain conditions) to repudiate their previous decisions altogether, common law rules are little more than rules of thumb – a guide to the usual demands of legal principle, in the context under review, but vulnerable to qualification and reassessment in the face of changing circumstances or even novel arguments.⁷ Inherently revisable, according to the demands of justice, common law rules obtain their temporary fixity from the needs of their subject matter; in certain fields, such as the criminal law, clear guidance is itself a primary requirement of justice. Such rules acquire their authority (such as it is) from judges' and lawyers' agreement, where it exists, that they remain a useful or appropriate guide to what legal principle requires. The shape and authority of common law rules alike depend on what may be a fragile consensus, at least among the senior judiciary, about the requirements of justice in the standard cases the rules address.

The claim to democratic legitimacy that typically accompanies statute law restricts the judges' freedom of maneuver: The search for consensus is more firmly guided by a definitive text. But we should not exaggerate the difference this makes to the deliberations of common law judges. There is more affinity between statutory interpretation and common law adjudication, on close inspection, than there is divergence. If courts are to cooperate loyally with legislative instructions, in obedience to the demands of representative democracy, they will

⁶ See generally Eisenberg, *The Nature of the Common Law*. But Eisenberg's distinction between social morality, on one hand, and the judge's personal morality, on the other, is too sharply drawn. A judge must rely on his own critical evaluation of custom, practice, and precedent in deciding what the public morality truly requires. He has recourse to shared morality, correctly – most plausibly – understood.

⁷ Cf. Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press, 1991), 104–11, 174–87.

normally accept the authority of the statute's "plain meaning."⁸ When there is a plain or obvious or ordinary meaning – a reading that the words, taken in context, most naturally suggest – such a meaning has a priority over less obvious readings, where the interpretative grounds would be more doubtful and contentious. But the context includes the legal principles that underpin the general body of rules that the statute leaves untouched. Understood as a contribution to an existing order of justice, based on common law tradition, the text must be interpreted in that spirit: Its true meaning reflects judicial apprehension of the particular "mischief" it was intended to alleviate and the nature of the remedy apparently provided for.⁹ The "real" text¹⁰ is the meaning of the words when interpreted in accordance with reason, rooted in an evolving and ever newly articulated common law.

Whereas a common law rule must be derived from an account of previous decisions, a statutory rule is fashioned by interpreting its text; but there is an interdependence between text and example in both cases. Although an earlier formulation of a common law rule is not strictly binding in subsequent cases, it may in practice offer powerful guidance. Without an authoritative statement of the rule, or at least the general principle it embodies, the existence of competing rationales for earlier decisions would leave legal doctrine substantially indeterminate. A higher court's characterization of the facts of the precedent case, and articulation of the grounds of decision, will therefore be highly influential: Its exegesis will normally provide the framework for future deliberation, even if the framework is not itself invulnerable to adaptation and (eventual) reconstruction.¹¹ Whether a rule has its basis in statute or common law, therefore, its content depends in part on an authoritative text; and in each case the text is understood by reference to examples. If a statute has a plain or obvious meaning, it has it in virtue of some class of instances to which its application was apparently intended. A persuasive interpretation seeks harmony between general justification and particular example: We acknowledge the rule as the source of a correct decision in the paradigm case.

The critical question, however, concerns the connection between the plain meaning, where it exists, and the penumbra of doubt that surrounds it, as regards the proper extension of the words employed. How far should the plain meaning control the statute's application to nonstandard cases, where the result might be unjust or inexpedient? It seems inevitable that here the ordinary meaning loses its ordinary authority, the propriety of the provision's application becoming a matter of independent normative judgment. How far, if at all, would the statute's

⁸ Cf. Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press, 1978), 203–13.

⁹ See *Heydon's Case*, (1584) 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637.

¹⁰ Cf. Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986), 17.

¹¹ Cf. Eisenberg, *The Nature of the Common Law*, 51–76; Schauer, *Playing by the Rules*, 179–87.

objects or purposes be threatened by a narrow construction, leaving the present case unaffected? Or how serious would be the affront to relevant individual rights or legitimate interests if the statute's policy were extended to encompass it? In the absence of a plain meaning, as regards the circumstances under review, the interpreter's value judgments are clearly critical; the interpreter must supply the meaning that the statute, in the events that have occurred, has left obscure.¹²

The standard case, where the plain meaning applies, will function in the interpreter's reasoning very much like a common law precedent. It will govern the decision of the new, nonstandard case only insofar as reason commends. That does not mean that all the pertinent questions of justice or policy are open, as if the statute did not exist – any more than the novel case at common law is decided without reference to precedent. The basic requirements of coherence and consistency informing the ideal of equality before the law, or formal justice, will favor certain conclusions over others. There must be a genuine effort to understand the statute's "intention" – its form of response to whatever social need or legal deficiency it is understood to address – as a basis for deciding its meaning or effect, if any, in the circumstances arising.¹³ The better attainment of the statute's general purposes is a good reason for its extension to the doubtful case, when the language allows; but such a reason cannot be conclusive. The requirements of consistency and coherence apply at the level of legal fundamentals, not merely in discrete areas of social policy: There must be a reconciliation (as far as possible) between the immediate governmental or public purpose, on the one hand, and more enduring features of the legal and constitutional landscape, on the other. As an authoritative interpreter, the judge becomes part author of the legislation: He cannot avoid the responsibility of setting boundaries to the rules enacted, according to his own judgments of political morality.

Like common law adjudication, statutory interpretation entails reasoning by analogy.¹⁴ The closer the analogy between the standard and novel cases, as judged by whatever principles or policies seem most pertinent, the stronger the case for the statute's application. The weaker the analogy, conversely, the better the case for concluding that, on its correct construction, the provision does not apply in the circumstances arising. When the analogy is weak, there is no basis for claiming that the novel or nonstandard case has been authoritatively determined: First principles, as reflected in the general law, are a safer and fairer guide to legitimate decision. The standard case is properly distinguished from the present circumstances, much as a precedent is distinguished when its *ratio*, properly understood, is held to be inapplicable to the case in hand. If the

¹² Cf. H. L. A. Hart, *The Concept of Law* (2nd ed.) (Oxford University Press, 1994), 124–36.

¹³ Cf. Lon L. Fuller, *The Morality of Law* (revised ed.) (Yale University Press, 1969), 82–91.

¹⁴ Cf. Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, 1996), 83–90.

standard case is rightly distinguished, on persuasive grounds, the rule's narrow construction is legitimately adopted. The interpretation can be assailed only by challenging the correctness of the relevant judgments of policy or principle. There can be no complaint that the statute, which is *ex hypothesi* ambiguous, has been improperly "overridden": Any suggestion of a threat to democratic authority would be misconceived.¹⁵

In his influential discussion of the contrasting errors of formalism, on the one hand, and rule skepticism, on the other, H. L. A. Hart drew attention to the frailty, in practice, of the distinction between communication by authoritative example and communication by authoritative general language.¹⁶ The "plain case" was only the familiar, constantly recurring one where "there is general agreement in judgments as to the applicability of the classifying terms." In the context of more doubtful instances, the language of the rule seems "only to mark out an authoritative example, namely that constituted by the plain case." The example may be used much like a precedent, even if the text will impose tighter constraints on interpretation. There must be resort to analogical reasoning, identifying relevant similarities and differences; and there is no readily discernible division between the immediate and the wider interpretative context:

In the case of legal rules, the criteria of relevance and closeness of resemblance depend on many complex factors running through the legal system and on the aims or purpose which may be attributed to the rule. To characterize these would be to characterize whatever is specific or peculiar in legal reasoning.¹⁷

It is important to emphasize that the "general agreement in judgments" that identifies the plain case reflects the power of many taken-for-granted, largely uncontroversial assumptions; enacted law is from its inception embedded in a preexisting framework of justice and shared morality. The existence of an obvious or ordinary meaning assumes a ready apprehension of underlying or general purposes: Ordinary meaning is as much a function of context as semantic conventions.¹⁸ But those objects or purposes cannot be understood without recourse to the interpreter's normative judgments and evaluations. Those judgments will color his perceptions of what, as reasonable persons, our representative legislators wished to achieve; they will also inform his conclusions about the intended limits of any legislative scheme and the unstated conditions to which its pursuit is implicitly subject.

The famous decision in *Riggs v. Palmer* provides an apt example.¹⁹ A man who had murdered his grandfather was held to be disqualified from inheriting his victim's estate even though he was named as beneficiary in the will, which

¹⁵ Cf. Sunstein, *Legal Reasoning and Political Conflict*, 183.

¹⁶ Hart, *The Concept of Law*, 126–9.

¹⁷ Hart, *The Concept of Law*, 127.

¹⁸ Cf. MacCormick, *Legal Reasoning and Legal Theory*, 205.

¹⁹ 115 N.Y. 506, 22 N.E. 188 (1889). See Dworkin, *Law's Empire*, 15–20.

satisfied the express requirements of the applicable statute. In the New York Court of Appeals, the majority conceded that “statutes regulating the making, proof, and effect of wills . . . if *literally construed*, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer.”²⁰ However, the court denied the appropriateness of a literal construction and affirmed the view that statutes could be “controlled in their operation and effect by general, fundamental maxims of the common law,” such as the principle that no one should profit from his own wrong.²¹

Some writers have noted the applicability of the statute’s plain language, emphasizing the court’s resistance to a morally unacceptable outcome²²; but the literal text may be a poor guide to the true meaning of the rule. There is no fundamental distinction here between meaning and (dis)application, which are ultimately different descriptions of the same interpretative issue. If equitable principles could temper the statute’s application, they could equally assist in determining its correct construction: The “letter of the statute” was treated as subservient to the true “intention of the makers.” On either analysis, there was no violation of any authoritative rule. The failure to apply a statute according to its true meaning would amount to an infringement of legislative supremacy – one that the court itself would clearly have denied. The statute was “overridden” mainly in the sense that its *literal* meaning was rejected in favor of a more plausible one, permitting an exception that the language, on any reasonable view, did not preclude.²³ The proper construction (or “interpretative reconstruction”²⁴) depends on context; and the context includes all those general principles of law that assist in determining the correct meaning or scope of the rule enacted.

III. Reason and Authority

Blackstone affirmed that Acts of Parliament that are “impossible to be performed” lack validity; and “if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void.”²⁵ The judges could properly “expound the statute by equity,” where general words produced unreasonable results in

²⁰ 115 N.Y. at 511, 22 N.E. at 190 (emphasis mine).

²¹ Cf. *Re Sigsworth*, [1935] Ch. 89; *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 QB 147.

²² See Schauer, *Playing by the Rules*, 189–91, 200–1, 209–11. Cf. Charles Silver, *Elmer’s Case: A Legal Positivist Replies to Dworkin*, 6 Law and Philosophy 381, 383–385 (1987).

²³ See further Allan, *Legislative Supremacy and Legislative Intention*, 63 Cambridge Law Journal at 696–701.

²⁴ See Ronald Dworkin, *Reflections on Fidelity*, 65 Fordham Law Review 1799, 1816 (1997).

²⁵ Sir William Blackstone, *Commentaries on the Laws of England* (vol. 1) (Oxford University Press, 1765), 91. Cf. Coke’s judgment in *Dr. Bonham’s Case*, (1610) 8 Co. Rep. 107, 118a, 77 Eng. Rep. 638, 652. The authors of statutes made “against law and right” could be assumed not to intend their apparent consequences.

particular instances; they were “in decency to conclude that this consequence was not foreseen” by its authors. Admittedly, Blackstone denied that the judges could altogether reject a statute on the ground that its “main object” was unreasonable; but in most cases a reasonable objective can be identified, or at least attributed, even if its fit with the text is less than perfect. We should not suppose that the distinction between the main object and merely collateral consequences is given independently of our interpretative efforts: We will recognize an unintended consequence by perceiving its absurdity.

A common law constitution entails a subtle blend of reason and authority. Enacted texts and judicial opinions provide important anchors for legal reasoning, substituting specific rules for general legal principle. Such rules are understood, however, by reference to the standard or paradigm cases over which their jurisdiction seems most reasonable; the content and boundaries of these rules are supplied by reasoned judgment as succeeding cases arise to test their true meaning and scope. We distinguish a rule’s “main object” from its merely “collateral consequences” on the basis of a plausible theory about its value and point. And while for reasons of stability and certainty a rule may acquire a certain independence from its underlying justification, it is overridden when the reasons against its application are powerful. When its rationale is clearly inapplicable, or circumstances arise to challenge its priority, the rule is subject to reappraisal; or, more strictly speaking, its pertinence to the case in hand is called into question.

Legislation is not to be understood as the sovereign’s command, displacing reason by preemptive authority, so much as an influential guidance to the requirements of reason in certain instances. The canonical text will help to determine the relevant instances, but only in combination with the reasoned judgment of its principal readers. Just as precedents are evaluated and their rules reformulated in the light of experience and cogent criticism, so statutes must be interpreted, and when appropriate reinterpreted, as elements of a larger design – public policy conjoined with legal principle in the overall effort to secure a common justice, widely acceptable to members of the community at large.

When (for example) a provision requires the court to impose a life sentence on someone convicted of a second “serious” offense, unless there are “exceptional circumstances relating to either of the offences or to the offender which justify its not doing so,”²⁶ its application to the facts of a particular case should reflect the statute’s rationale, appropriately conceived. The characterization of circumstances as “exceptional,” or otherwise, must be sensitive to purpose and context: Reason and authority are intertwined. If the legislative purpose was to protect the public against dangerous offenders, it can be deduced that the

²⁶ Crime (Sentences) Act 1997, § 2.

rule does not apply to someone who poses no danger: When the “statutory assumption” is shown to be “misplaced,” the situation, regarded in the statutory context, is properly deemed “exceptional.”²⁷ Earlier judgments had denied that the youth of the offender at the time of the first offense, or the lapse of time between offenses, or the different nature of the “serious offenses” involved, could be treated as “exceptional” because such features were not uncommon; but those conclusions overlooked the legislative rationale. Because such matters were plainly relevant to the existence of a danger from which the public needed protection, they could in appropriate cases justify the disapplication of a general rule otherwise capable of causing grave injustice. A draconian rule, literally construed, was rightly interpreted so as to further a legitimate statutory purpose while preserving intact the basic principles of criminal justice.²⁸

A rule enjoys peremptory force, whether at common law or under statute, only in the sense that it determines the balance of reasons in the standard case; but the standard case may be as broadly or narrowly conceived as the courts think fit. In practice, there will be no clear distinction between the application of the rule and decision in accordance with its underlying reasons, where persuasive; for the true extension of the rule will appear only as succeeding cases arise to test its limits. The authority of any official extension of the legal record – whether statute or precedent – is a fragile, contextual one, reflecting the strength of its entitlement (if any) to obedience in current circumstances. Blackstone denied that a statute could be altogether rejected as simply unreasonable; but reasonableness is a matter of degree, allowing in most cases for a morally acceptable interpretation. A statute so unreasonable that no Parliament could knowingly enact it – if performing its lawmaking role within a democratic polity based on the rule of law – would have to be dismissed as an aberration: Our interpretative resources would fail us, confronted by a breach of the principles of justice we treat as fundamental.

It is widely understood that (even in Britain) legislative supremacy is modified, or softened, in practice by statutory interpretation attuned to the demands of constitutional justice: “In the absence of express language or necessary implication to the contrary, the courts . . . presume that even the most general words were intended to be subject to the basic rights of the individual.”²⁹ In the result, the courts of the United Kingdom, “though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”³⁰ It is less well understood, however, that matters of

²⁷ *R. v. Offen*, [2001] 1 WLR 253, 272.

²⁸ The correctness of this approach was affirmed by the House of Lords in *R. v. Drew*, [2003] UKHL 25 at [20], [2003] 4 All ER 557.

²⁹ *R. v. Secretary of State for the Home Department, ex parte Simms*, [2000] 2 AC 115, 131 (Lord Hoffmann).

³⁰ *Simms*, [2000] 2 AC at 131.

“necessary implication” are in practice questions of judgment and degree; even “express language” obtains its true meaning, in part, from the expectations and presumptions that provide the interpretative context for effective communication.

The conventional view that Parliament is ultimately subject only to political, not legal, constraints, is therefore false; and we should question the view that parliamentary sovereignty “means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights.”³¹ Parliament’s sovereignty is confined by the limits of our ability to attribute a defensible meaning to its enactments – one we can square with our loyalty to a public institution dedicated to pursuit of the common good. If fundamental rights “cannot be overridden by general or ambiguous words,” it is not (or not merely) because “there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process”³²; but rather because the “full implications” will become apparent only in the light of unfolding events. The proper reconciliation between fundamental rights and competing public interests can be made only when specific instances confront us with the consequences of the competition in all their illuminating particularity. Novel situations will force us to confront the challenge to our political values anew; and the statutory text cannot resolve our difficulties unaided.

A prisoner who was serving a life sentence for murder wished to speak to a journalist in an effort to establish his innocence. Following government policy, however, the prison governor refused to allow the journalist to conduct an interview (except under unacceptable conditions of confidentiality). The House of Lords held the policy unlawful as an unjustified impediment to the prisoner’s right to freedom of expression: His access to a journalist, who commanded the resources to investigate the facts, would enable him effectively to challenge his conviction, exposing any errors in the administration of justice.³³ The Home Secretary’s policy was imposed under the Prison Act of 1952, which authorized the making of rules for the regulation of prisons and the treatment of prisoners. Literally construed, and entailing a blanket ban on interviews, the pertinent rules were *ultra vires*; but the “principle of legality” justified a narrower construction. The rules should be understood to allow such interviews when a proper foundation had been laid in previous correspondence.

The principle of legality operated as a means of adjusting a general statutory power, and the subordinate legislation it authorized, to the demands of constitutional principle. The exercise of discretionary executive power became subject to common law constraints, which resisted unnecessary legislative interference. It is precisely the judges’ ability to adapt the statutory provisions to the needs of

³¹ *Simms*, [2000] 2 AC at 131.

³² *Simms*, [2000] 2 AC at 131.

³³ See generally *Simms*.

the case, or generic case, that demonstrates the interdependence of legislative and judicial power. The statutory purposes are not disregarded, as if common law rights were unaffected in the absence of “express language” or “necessary implication” to the contrary. The fundamental nature of these rights – to freedom of speech and access to justice – makes them central to our analysis of the statutory scheme of control; but their content and scope will reflect the context in which they operate. Such rights survive to the extent that legitimate governance demands, though the concrete entitlements they warrant will reflect the limitations or restrictions that public policy (expressed in statute and rules) fairly requires.

There is no enduring conflict between legal principle and public policy, or between fundamental rights and democratic decision making. For members of Parliament can be assumed, in a liberal democracy, to act on the understanding that such rights must be preserved as far as possible. The only practical question concerns their true meaning and consequence in the circumstances arising; and on that question the statute – taken in isolation – can rarely, if ever, give a definitive answer. Even the most prolix grant of power, specifying the circumstances of its intended operation in elaborate detail, cannot prescribe all the relevant conditions. Its practical application will be as much dependent on judgments of purpose and propriety as a more open-ended provision, even if its specificity obliges the interpreter to justify his reading more fully, with equivalent attention to detail. The legislature may seek narrowly to circumscribe both administrative and judicial discretion, but it cannot absolve either judge or official from his own responsibility to safeguard constitutional governance. Obedience to the text cannot supplant the dictates of reason; for every text is subject to the exceptions and qualifications that reflection on particular cases makes persuasive.³⁴

The general principle of constitutional common law is that “the more substantial the interference with fundamental rights the more the court will require by way of justification before it can be satisfied that the interference is reasonable . . .”³⁵ Though normally expressed as a principle to govern subordinate legislation or administrative decision, it applies with equal force to primary legislation; the principle reflects a legitimate assumption about legislative intention, correctly construed. For the true nature and extent of any authorized interference with fundamental rights is always a matter of what is defensible in the light of the statute’s apparent aims and objectives. The deeper the intrusion into established rights or liberties entailed or permitted by a suggested interpretation, the more reluctant the courts will be to accept its claim to legislative authorization.

³⁴ See further T. R. S. Allan, *Constitutional Dialogue and the Justification of Judicial Review*, 23 *Oxford Journal of Legal Studies* 563 (2003).

³⁵ *Simms*, [2000] 2 AC at 130 (citing *R. v. Ministry of Defence, ex parte Smith*, [1996] QB 517, 554).

Even the clearest language will be understood as pertaining to cases of necessity, where such intrusion may be most readily justified. In the same way, what is necessarily “implied” depends on an appraisal of the statute’s policy, in the light of prevailing circumstances, rather than submission to the inexorable logic of the text’s “command.” It is a matter of what reasons can be offered to those whose rights are threatened, and whether they could fairly be expected to command assent in view of the genuine needs of the public good.³⁶ What the statute *means* is a question of what can be *justified* when policy and principle are brought into harmony; and responsibility for the outcome belongs as much to the court as to the legislature.

It is usually possible to characterize the standard or central case in the light of a provision’s apparent general aims, while excluding a range of situations where countervailing interests or conflicting principles are thought to take clear precedence. But when a statutory provision appears, on its most natural reading, to violate settled expectations or well-established principles, the standard case may not be easy to identify. A very narrow construction may be called for, in deference to the fundamental assumption that the legislature acts in good faith for the public good and does not authorize unreasonable outcomes. Where the literal (or acontextual) meaning gives rise to absurdity, or grave injustice, the central case of application must be judicially constructed, as far as possible, according to whatever requirements of political morality seem most plausible and pressing. Just as a dubious precedent may sometimes be so steadily distinguished in later cases as to become confined, for practical purposes, to its own particular facts, so a statutory provision may, *in extremis*, be confined to very limited circumstances. We may be forced to conclude that its potential effects were misunderstood by those who drafted and approved the pertinent clause: They had overlooked some features of the context – especially the constitutional context – that were critical to any rational scheme of legislation, worthy of obedience.

In response to a narrowly technical provision, purporting to restrict the admission of evidence of the complainant’s sexual behavior, in a trial for a sexual offense, the House of Lords affirmed the trial judge’s paramount duty to ensure a fair trial.³⁷ Because evidence of previous sexual relations between complainant and defendant would sometimes be relevant to the issue of consent, such evidence must be admitted – notwithstanding the *prima facie* statutory prohibition – when its exclusion would endanger the fairness of the trial. The judges acknowledged the need to address the “mischief” Parliament had sought to curb: Evidence of the complainant’s previous sexual experience had been too freely admitted in the exercise of judicial discretion. It was nonetheless thought

³⁶ See further Allan, *Constitutional Justice*, 125–33.

³⁷ *R. v. A. (Sexual Offence: Complainant’s Sexual History)*, [2001] UKHL 25, [2002] 1 AC 45 (interpreting the Youth Justice and Criminal Evidence Act 1999, § 41).

right to “proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right of the accused to put forward a full and complete defence by advancing truly probative material.”³⁸

IV. Reason and Tradition

The characteristic resort to analogy enables courts to avoid highly abstract ideas or very broad statements of principle in the great majority of cases: Analogies can be sought at lower levels of abstraction, by reference to norms applicable primarily to the context in view. The court’s main focus on a fairly narrow range of issues makes it unwise to be too ambitious; a shift of focus, stimulated by subsequent cases, may reveal serious flaws in a theoretical analysis built on limited practical experience. It is doubtful, however, whether more wide-ranging discussion should ever be condemned as *illegitimate*, as if it substituted legal philosophy for democratic deliberation.³⁹ The court’s high-level theorizing, where it occurs, will by its nature lack authority: The decision’s *ratio* can be properly constructed at some more mundane level, sufficient to reconcile it with different conclusions in later cases based on altered circumstances. There is, then, no usurpation of the role of elected politicians because *obiter dicta*, however eminent their authors, bind no one. Insofar as judicial analysis of underlying principle contributes to a better understanding of a legal decision and its possible implications for analogous cases, it should be welcomed as part of the wider public debate that deliberative democracy entails.

It is not “the absence of a democratic pedigree”⁴⁰ that gives a system of precedent, analogy, and “incompletely theorized agreement” such importance, but rather the way in which it reconciles reason and tradition. The sharing of paradigms is the basis for elucidating and refining a collective moral code, expressing the fundamental legal commitments of the whole community as shaped by history and experience. It is only the focus on agreed outcomes in particular instances that provides assurance that abstract principles possess a genuine core of shared meaning; the dialogue obtains a practical substance it might otherwise lack. Insofar as “the development of large-scale theories of the right and the good”⁴¹ is entailed by the effort to make sense of our own democratic tradition, we should acknowledge the collaborative nature of the task – one that transcends distinctions between the different branches of government.

³⁸ *R. v. A.*, [2001] UKHL 25 at [45]. See further Allan, *Legislative Supremacy and Legislative Intention*, 63 Cambridge Law Journal at 705–8.

³⁹ Sunstein appears to make this charge as part of his defense of “incompletely theorized agreements” that avoid unnecessarily abstract speculations. See *Legal Reasoning and Political Conflict*, 44–53.

⁴⁰ Sunstein, *Legal Reasoning and Political Conflict*, 46.

⁴¹ Sunstein, *Legal Reasoning and Political Conflict*, 53.

For judicial theorizing is as much a part of the deliberative enterprise of law as legislative debate. The *influence* of large-scale or abstract theories of justice is a function of their cogency: They have no practical consequences, in the courtroom or outside, except insofar as other citizens and officials are persuaded of their merits. The theories of the right or the good that underlie legislation enjoy no greater *authority* than those endorsed by judges. A moral principle is either understood and accepted, subject to appropriate qualification, or rejected as erroneous. It cannot be *enacted* along with all the infinite gradations of weight that its application requires. Legal authority, strictly speaking, attaches only to the *rule* enacted, or adopted, for the standard or central case of (uncontroversial) application.

When we truly appreciate the virtues of common law reasoning for a complex world – one in which we are unlikely to find consensus about ultimate values – we will question the conventional wisdom that distinguishes sharply between legal thought and political argument. If people are often able to agree on relatively concrete rules or standards, even when more abstract ideas would not command the same assent, are there not similar implications for both law and politics? If “incompletely theorized judgments on particular cases are the ordinary material of law,”⁴² the same must be true for politics in a pluralist democracy. If, moreover, moral and political theories are only the “means by which people make sense of the judgments that constitute their ethical and political worlds,” so that neither the abstract nor the particular should be treated as foundational,⁴³ the virtues of humble incrementalism are virtues of politics as well as law. And insofar as judicial theorizing may seem disrespectful by forcing people “to contend, unnecessarily, over their deepest and most defining moral commitments,”⁴⁴ the same must often be true for political theorizing in a country divided by serious disagreements and competing ideologies.

At its best, common law reasoning instantiates a republican ideal of democratic governance – one that makes the pursuit of justice its central aim but acknowledges the right (indeed, duty) of every citizen to bring his own moral judgments to bear on the matters at issue, according to his opportunities for influence. Sunstein notes the important connection between procedural justice and the very pliable nature of law when reasoning by analogy plays a critical role.⁴⁵ Each participant in the legal system is entitled to demand a reappraisal of precedent from a new perspective: He can argue that his own case should be judged in the light of its distinctive features, according to the general theory he defends. If, however, reasoning by analogy is equally legitimate in the sphere

⁴² Sunstein, *Legal Reasoning and Political Conflict*, 37.

⁴³ Sunstein, *Legal Reasoning and Political Conflict*, 52.

⁴⁴ Sunstein, *Legal Reasoning and Political Conflict*, 50.

⁴⁵ Sunstein, *Legal Reasoning and Political Conflict*, 194.

of statutory interpretation, similar considerations apply to the application of the rules that emerge from the legislative forum. The citizen must be free to question the application, and hence the correct construction, of a rule when his case is significantly different (according to some plausible theory of its significant features) from the standard case that the earlier construction chiefly addressed. And if the general rule is subject to reappraisal in the face of unanticipated events, or novel arguments, the same may be true of whatever general theories of the right or the good informed its original enactment.

When the common law is understood as a steadily evolving order of justice, rooted in historical experience but open to changing ideas and perceptions, it can form the basis of a genuine public reason. Insofar as it reflects and embodies settled principles of justice, explaining the paradigms that serve to structure a coherent constitutionalism, the common law is no less “democratic” than the legislation that supplements and modifies it. For though the participation of elected representatives makes an essential contribution, their enactments acquire their full meaning and work their effect within the larger body of preexisting law: The former (in a sense) authenticate the latter, even while adapting it to new demands and fresh insights. The correct reconciliation, moreover, between new provisions and established principles is the one that best serves the political community, all things considered – a profoundly difficult moral judgment most appropriately made incrementally, as concrete cases arise for decision.

The value of a litigant’s right to argue about the analogies most suitably invoked in his own case depends, in part, on the court’s receptiveness to new ideas. But the legal climate that nurtures new ideas is one stimulated by an open and responsive political culture, characterized by freedom of speech and the other hallmarks of a state’s respect for human dignity. There is therefore an important connection between natural justice (or procedural fairness) and freedom of expression: The latter is as fundamental to the substance of a genuine “common law” as the former is to its impartial application. The special value of political speech in a democratic polity must be sought not only in its contribution to the enactment of just laws but also in its role at the heart of a legal order capable of more subtle adaptation to changing social values and moral priorities. A flourishing deliberative democracy provides the appropriate mechanisms for debate over questions of justice, encouraging appeal to widely accepted principles that reflect an understanding of the polity as a society of equals. If, however, politics is conceived as a collaborative pursuit of justice for all, common law adjudication must be accorded a complementary function, allowing enacted rules and judicial precedents to be reinterpreted in light of the shifting attitudes and fresh agreements that deliberation stimulates. The litigant’s access to an independent court is the counterpart, in the legal system, of his participation in government, enabling him to seek enforcement of what

he considers in good faith to be the most reasonable interpretation of existing law.⁴⁶

Deliberative democracy and common law adjudication can coexist as mutually supporting pillars of a “community of principle”⁴⁷; judicial theorizing must find an echo in the wider debates in society at large. Herein lies the explanation for Edward Levi’s suggestion that the role of analogy in legal reasoning ensures that new ideas, as they “win acceptance in the community,” influence legal decision making. Reasoning by example is a process in which the litigants participate in the court’s lawmaking function, bringing into the law “the common ideas of the society.”⁴⁸ Levi betrayed an exaggerated distrust of general principles, failing to acknowledge their critical role in the use of example and analogy; but he rightly emphasized the close dependence of legal doctrine on evolving social morality and shifting public attitudes. The point is that common law doctrine, though imposing necessary constraints of consistency in the short term, is always also in a state of flux as it struggles to accommodate competing pressures and conflicting goals. Its rules are only revisable rationalizations of particular precedents – however persuasive their initial justifications may once have seemed – and its principles are only the moral or social reasons that inform those rationalizations.⁴⁹

V. Conclusion

The rule of law is ultimately an ideal of constitutional justice founded on reason: Legal obligations are conceived as morally binding, when consistent with equal citizenship, because they can fairly claim to elicit the consent of independent moral agents, loyal to the political community and its need for a coordinated common good.⁵⁰ A common law legal order embodies that ideal by giving reason pride of place. The equality secured by adherence to precedent is an equality of justice: The formal equality consequent on the consistent and impartial application of rules surrenders to a substantive equality as the rules are revised and reformulated in response to arguments of principle. Distinctions between persons must be rationally justified in accordance with a consistent and coherent account of the common good, open to public scrutiny and criticism. The written

⁴⁶ See T. R. S. Allan, “Common Law Constitutionalism and Freedom of Speech” in Jack Beatson and Yvonne Cripps, eds., *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press, 2000).

⁴⁷ Cf. Dworkin, *Law’s Empire*, 214.

⁴⁸ Edward H. Levi, *An Introduction to Legal Reasoning* (University of Chicago Press, 1949), 5–6.

⁴⁹ Cf. Eisenberg, *The Nature of the Common Law*, ch. 6.

⁵⁰ See T. R. S. Allan, *The Rule of Law as the Rule of Reason: Consent and Constitutionalism*, 115 *Law Quarterly Review* 221 (1999); Allan, *Constitutional Justice*.

law, whether statute or precedent, is only part of a broader and deeper moral order, fashioned and refashioned by reflection and experience. As an order of constitutional justice in which the exercise of governmental power must be integrated with an independent framework for the regulation of civil society, the common law embodies a distinctively communitarian ideal: Political authority is ultimately subservient to social tradition and the moral judgments that underlie and nurture it.⁵¹

The integration of law and society, based on evolving attitudes to justice and the reinterpretation of tradition, is served by a model of adjudication that gives the litigant (who represents all those whose claims of right must stand or fall with his) a central and creative role. He determines the shape and character of the court's decision by the arguments he chooses to offer, requiring the judge to view the case from the litigant's perspective, rooted in his own understanding of the constitutional order he loyally affirms. By "presenting proofs and reasoned arguments for a decision in his favor,"⁵² the litigant obliges the court to address the issues of principle he identifies; and because his own participation is so important to the process, he has strong grounds for accepting the decision as a legitimate outcome even when it goes against him.⁵³

Even if citizens hold widely divergent opinions about the true meaning of the principles of justice that inform the constitutional order, common law adjudication is attuned to the clash of interpretative convictions. When the application of rules, whether statutory or common law, is sensitive to claims of constitutional principle, invoking rival accounts of legal and social tradition, the law goes as far as possible to elicit consent. Legal reasoning offers a test for "whether the society has come to see new differences or similarities"; the "loyalty of the community is directed toward the institution in which it participates."⁵⁴ In a democracy based on the rule of law, it is as important that the *application* of rules be justified to those most closely affected as that their *enactment*, or endurance, enjoy parliamentary or electoral support; and the impartial judgment of claims of right, grounded in a theory of the scheme of justice that statute and precedent jointly constitute, is what common law adjudication seeks to provide.

Levi's discussion also sought to show the similarities between common law reasoning and constitutional adjudication under a "written" constitution couched in broad, ambiguous terms. The same interplay of general principle and specific example, allowing for the inspection of competing analogies, enabled constitutional doctrine to evolve in response to changing events and altered perceptions of social needs. Judicially created categories reflected competing

⁵¹ Cf. Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press, 1992), 448–55, 463–76.

⁵² Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *Harvard Law Review* 353, 364 (1978).

⁵³ Cf. Levi, *An Introduction to Legal Reasoning*, 5.

⁵⁴ Levi, *An Introduction to Legal Reasoning*, 104.

constitutional concerns, enabling cases to be grouped and compared from different points of view. American constitutionalism is in fact best understood as an evolutionary common law system, making settled doctrine and traditional practice more important than the original text on which they have built.⁵⁵ While adherence to precedent is justified, in part, by acknowledgment of the value of experience, the past can be repudiated when the arguments of principle are sufficiently cogent. And even the most striking reversal of previous doctrine, repudiating earlier conceptions of justice, is always the culmination of a deliberative process that legal analysis both informs and reflects.⁵⁶

Viewed as a process of governance, the common law provides a constantly evolving blend of traditional wisdom and fresh moral insight. The various formal sources of law – precedent, legislation, and constitution – establish the paradigm cases that any eligible legal interpretation must respect; but the true meaning of any particular decision or statute or constitutional provision must be determined in light of everything else. Theories of absolute parliamentary sovereignty and originalist and textualist approaches to constitutional interpretation are alike in separating (or attempting to separate) the relevant text from the context in which its life is led. The common lawyer avoids this mistake by recognizing the interdependence of the sources of law, as well as the deep dependence of each on principles of justice embedded in legal and constitutional practice, and hence partly constitutive of “democracy” itself. The true meaning of any textual provision is ultimately a matter of its correct application (or disapplication) in the infinite variety of circumstances arising from time to time; and that judgment is always a function of the reasons citizens and officials can offer one another in the debate over political morality that nourishes, and draws on, the common law.

⁵⁵ Cf. David A. Strauss, *Common Law Constitutional Interpretation*, 63 University of Chicago Law Review 877 (1996).

⁵⁶ Strauss, *Common Law Constitutional Interpretation*, 63 University of Chicago Law Review at 901–6.

The Myth of the Common Law Constitution

JEFFREY GOLDSWORTHY

I. Introduction

The relationship between the common law and statute law is a subject of debate. The controversy goes deeper than questions of interpretation, such as – given the doctrine of legislative supremacy over the common law – why, how, and to what extent the meaning of a statute can legitimately be governed by common law principles.¹ The answers to those questions depend partly on more basic issues concerning the legal foundations of the two bodies of law, and their respective status. The orthodox view is that because Parliament can enact statutes that override any part of the common law, statute law is superior to common law. But according to an increasingly popular theory, Britain’s “unwritten” constitution consists of common law principles, and therefore Parliament’s authority to enact statutes derives from the common law. As Trevor Allan puts it, “the common law is prior to legislative supremacy, which it defines and regulates.”² This theory has become so popular that even the British government has endorsed it. When the Attorney-General Lord Goldsmith was asked in Parliament what was the government’s understanding of “the legal sources from which the legislative powers of Parliament are derived,” he replied, “The source of the legislative powers is the common law.”³

I thank Janelle Greenberg, Louis Knafla, Dale Smith, and Patrick Emerton for very helpful comments on an earlier draft.

¹ See Jeffrey Goldsworthy, “Legislative Intentions, Legislative Supremacy, and Legal Positivism” in Jeffrey Goldsworthy and Tom D. Campbell, eds., *Legal Interpretation in Democratic States* (Ashgate/Dartmouth, 2002), 45, reprinted in 42 *San Diego Law Review* 493 (2005).

² T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001), 271; see also id. at 139, 225, 229, 240, 243; T.R.S. Allan, “Text, Context, and Constitution: The Common Law as Public Reason” in this volume; T.R.S. Allan, “The Common Law as Constitution: Fundamental Rights and First Principles” in Cheryl Saunders, ed., *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996), 146.

³ *Hansard* (HL), 31 March 2004, col. WA 160, quoted in Lord Anthony Lester, *Beyond the Powers of Parliament*, [2004] *Judicial Review* 95, 96.

This theory threatens to invert the relationship between statute law and common law as traditionally understood. In this context, the common law is usually characterized either in positivist terms, as a body of rules that the judges have made and can therefore change, or in Dworkinian terms, as a body of norms that rests on abstract principles of political morality, which the judges have ultimate authority to enunciate and expound.⁴ On either view, instead of the judges' being clearly subordinate to Parliament and obligated to obey its laws, they are promoted to a position of superiority over it. On the first view, they have only a self-imposed legal obligation to obey its laws – a “self-denying judicial ordinance” – that they have legal authority to repudiate.⁵ On the second view, the scope of any obligation derives from abstract principles of political morality and is ultimately for them to authoritatively determine. Because even on the first view, judges in deciding whether they should continue to obey statutes are guided by their assessment of political morality, the two views are in this respect similar.⁶ Both views amount to a takeover bid: They threaten – or promise – to replace legislative supremacy with judicial supremacy.⁷ Instead of Parliament being the master of the constitution, with the ability to change any part of it (except, perhaps, for the doctrine of legislative supremacy itself), the judges turn out to be in charge. The direction in which some of them would like to develop the constitution is apparent in recent statements of Laws J. In administrative law, “the common law has come to recognize and endorse the notion of constitutional, or fundamental, rights.”⁸ Parliament retains its sovereignty for now but may lose it “in the tranquil development of the common law, with a gradual reordering of our constitutional priorities to bring alive the nascent idea that a democratic legislature cannot be above the law.”⁹

Sometimes, the basic argument is extended to the authority of written constitutions, which is also held to derive from the common law. Dixon C. J., reputedly Australia's greatest judge, maintained that the common law was the “ultimate constitutional foundation” that underpinned the authority of the Australian Constitution.¹⁰ This was because that constitution was enacted in a

⁴ See, e.g., section III. I am using the term “Dworkinian” in a loose, generic sense. I am concerned with constitutional theorists who are influenced by Ronald Dworkin, rather than with Dworkin himself.

⁵ Justice E. W. Thomas, *The Relationship of Parliament and the Courts*, 31 Victoria University of Wellington Law Review 5, 26 (2000).

⁶ They differ as to whether those principles should be classified as legal as well as moral/political principles.

⁷ It is welcomed as a promise in M.D.J. Conaglen, *Judicial Supremacy: An Alternative Constitutional Theory*, 7 Auckland University Law Review 665 (1994).

⁸ *International Transport Roth GmbH v. Secretary of State for the Home Department*, [2003] QB 728, 759.

⁹ Sir John Laws, “Illegality and the Problem of Jurisdiction” in Michael Supperstone and James Goudie, eds., *Judicial Review* (2nd ed.) (Butterworths, 1997), 4.17.

¹⁰ Sir Owen Dixon, “The Common Law as an Ultimate Constitutional Foundation” in his *Jesting Pilate* (Law Book Co., 1965), 203.

statute by the British Parliament: Its authority depended on Parliament's and therefore derived ultimately from Britain's unwritten, supposedly common law, constitution.¹¹ Recently, Australian proponents of unwritten constitutional principles have attempted to push Dixon's suggestion much further than he would have approved of.¹² A similar idea is being promoted in Canada. According to Mark Walters, in several recent decisions of the Canadian Supreme Court "the legal authority for the operative constitutional principles is said to derive from Canada's unwritten, or common law, constitution."¹³ Walters's own writings assume that there is such a "common law constitution," whose "structural principles" include the rule of law, the separation of powers, and individual rights.¹⁴ Trevor Allan maintains that this is true of all the constitutions in former Commonwealth countries, both written and unwritten: All are based on unwritten principles of constitutionalism and the rule of law, which lie at the heart of the common law tradition¹⁵: "[T]hese (common law) jurisdictions should, to that extent, be understood to *share* a common constitution," whose common features "are . . . ultimately more important than such differences as the presence or absence of a 'written' constitution, with formally entrenched provisions, whose practical significance may easily be overestimated."¹⁶ This understanding of the authority of written constitutions may have drastic consequences. Limits that the written constitution imposes on the exercise of legislative or executive powers might be supplemented by unwritten, "common law" limits. Even the power to amend the constitution might be held to be limited by deeper common law principles, which can be changed (or authoritatively declared to have changed) only by judicial decision.¹⁷

The term "common law constitutionalism" is now widely used to denote the theory that the most fundamental constitutional norms of a particular country or countries (whether or not they have a written constitution) are matters of

¹¹ Dixon, "The Common Law as an Ultimate Constitutional Foundation" in *Jesting Pilate*, esp. 203, 206.

¹² Michael Wait, *The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited*, 29 *Federal Law Review* 58 (2001). For an earlier Australian contribution, see Michael J. Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (Law Book Co., 1985), 228–30, 253–7.

¹³ Mark D. Walters, *The Common Law Constitution in Canada: Return of the Lex Non Scripta as Fundamental Law*, 51 *University of Toronto Law Journal* 91, 92 (2001).

¹⁴ See, e.g., Mark D. Walters, "The Common Law Constitution and Legal Cosmopolitanism" in David Dyzenhaus, ed., *The Unity of Public Law* (Hart Publishing, 2004), 431.

¹⁵ See Allan, *Constitutional Justice*.

¹⁶ Allan, *Constitutional Justice*, 4–5 (emphasis in original); see also id. at 243. For critical discussion, see Jeffrey Goldsworthy, *Homogenising Constitutions*, 23 *Oxford Journal of Legal Studies* 483 (2003).

¹⁷ Allan, "The Common Law as Constitution" in Saunders, *Courts of Final Jurisdiction*, 158, 159, 164.

common law.¹⁸ As previously noted, there are different versions of common law constitutionalism – including legal positivist and Dworkinian versions – built around different conceptions of the common law. Common law constitutionalism is defended on historical, as well as philosophical, grounds.¹⁹ The historical argument is that England’s unwritten constitution was always a matter of common law. The philosophical argument is that its present unwritten constitution is best analyzed as a matter of common law. I will first discuss the historical evidence, and then turn to philosophical analysis.

II. The Historical Record

The historical defense of common law constitutionalism has distinguished antecedents. According to John Phillip Reid, common law constitutionalism was orthodoxy in Britain until the late eighteenth century, when it was supplanted by the relatively new theory of parliamentary sovereignty.²⁰ J.G.A. Pocock famously argued that in the seventeenth century, the common law was regarded by its practitioners – most notably Sir Edward Coke – as embodying an immutable “ancient constitution” that conferred and limited governmental powers.²¹ Much earlier, C. H. McIlwain claimed that in the medieval period, the common law constituted a fundamental law that bound both the king and the “High Court of Parliament,” which could enunciate, but not change, that law.²²

McIlwain’s claims have been discredited, Pocock’s thesis heavily qualified, and Reid’s views shown to be dubious.²³ Yet it is still widely assumed that

¹⁸ See, e.g., Thomas Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, 23 Oxford Journal of Legal Studies 435 (2003); Thomas Poole, *Questioning Common Law Constitutionalism*, 25 Legal Studies 142 (2005).

¹⁹ For historical argument, see Walters, *The Common Law Constitution in Canada*, 51 University of Toronto Law Journal at 105–36.

²⁰ John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Legislate* (University of Wisconsin Press, 1991), 4, 6, 24, 63, 78, 81.

²¹ J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press, 1957). Pocock modified his position in the 1987 reissue of this book, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century, A Reissue with a Retrospect* (Cambridge University Press, 1987).

²² Charles H. McIlwain, *The High Court of Parliament and Its Supremacy* (Yale University Press, 1910), ch. 2; Charles H. McIlwain, “Magna Carta and Common Law” in *Constitutionalism and the Changing World* (Macmillan, 1939), 132, 143.

²³ See Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999), 38–45, 60, 62 (discussing McIlwain); J. W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Johns Hopkins University Press, 2000), 206 n.34 (same); Goldsworthy, *The Sovereignty of Parliament*, 188–92 (discussing Reid); Tubbs, *The Common Law Mind*, 130 (discussing Pocock); Johann P. Sommerville, “The Ancient Constitution Reassessed: The Common Law, the Court and the Languages of Politics in Early Modern England” in R. Malcolm Smuts, ed., *The Stuart Court and*

England has long had a common law constitution. Brian Tamanaha, for example, writes that:

England has had an *unwritten* constitution for centuries . . . This constitution served as the functional equivalent of the written U.S. Constitution in the sense of a law that set limits on the law-makers. Coke's decision in *Doctor Bonham's* case testified to this understanding . . . The basic idea was that the common law, a body of private law reflecting legal principles, established the fundamental legal framework.²⁴

Unfortunately, all these propositions except the first are probably wrong. England has never had a constitution that served as the functional equivalent of the U.S. Constitution. It has been conclusively established that the common law never subjected Parliament's legislative authority to limits whose violation could warrant the judicial invalidation of a statute.²⁵ Coke's dicta in *Doctor Bonham's* case possibly indicate that he thought otherwise, although even that is doubtful; but if he did, he was in a tiny minority and later changed his mind.²⁶ This chapter challenges the final, more modest proposition that the common law "established the fundamental legal framework" of English government.

There is no doubt that many common law principles, such as those relating to the Crown's prerogatives, have long been part of the unwritten constitution. At issue here is the broader claim that the unwritten constitution as a whole, including its most basic doctrines such as parliamentary sovereignty, is a matter of common law.²⁷ I will argue that the extent to which it should be regarded as being, or at any time having been, a matter of common law depends on the answers to at least three different, but interrelated, questions. Over the centuries, these questions have been answered in many different ways, some of which are as follows.

A. What Is the Nature of the Common Law?

Does the common law consist of: (1) the customs of the community, regarded either as immemorial and unchanging, or as gradually evolving, (2) the "common erudition," or learned tradition, of the common law bench and bar, (3) a body of norms resting on fundamental "maxims" or "principles" whose identification, exposition, and application involves an essentially moral "reason" and judgment, (4) a body of judge-made rules laid down ("posited") by courts in

Europe: Essays in Politics and Political Culture (Cambridge University Press, 1996), 39–64; Johann P. Sommerville, *Royalists and Patriots: Politics and Ideology in England 1603–1640* (2nd ed.) (Longman, 1999), 103–4, 261–2.

²⁴ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004), 57 (emphasis in original).

²⁵ Goldsworthy, *The Sovereignty of Parliament*; Tubbs, *The Common Law Mind*, 21, 27, 30, 34–5, 46, 55, 57, 77, 183, 186.

²⁶ See generally Goldsworthy, *The Sovereignty of Parliament*; see also *id.* at 111–17 (discussing Coke).

²⁷ For present purposes, nonjusticiable constitutional conventions, which are not regarded as "law" at all, can be disregarded. The claim in question concerns constitutional norms that are recognized and applied by the courts.

past cases, or (5) some combination of two or more of these alternatives (e.g., the customs of the community, insofar as they are consistent with “reason,” or the customs of the community, insofar as they are recognized and applied by the common law courts)?

B. What Is the Scope of the Common Law?

How is the scope of the common law best understood: (1) does it confer and impose powers, rights, obligations, and liabilities only with respect to particular subject matters, mainly in areas of private law such as land law and contract law but including some matters of public law such as the “ordinary” prerogatives of the Crown? On this view, powers, rights, and so on with respect to other subject matters – such as the royal succession, the “absolute” prerogatives of the Crown, and the powers and privileges of Parliament – subsist independently of the common law (even if the common law necessarily recognizes and defers to them). (2) Or is the common law omnicompetent and comprehensive, in the sense that all nonstatutory legal powers, rights, and so on – including the power to make statutes – are its creatures, and subject to its control?

C. Who Has Ultimate Authority to Expound the Common Law?

Is the authority to expound the common law possessed by: (1) the Crown, (2) Parliament (meaning the Crown-in-Parliament), or (3) the regular common law courts?

A few observations concerning these questions may be helpful. First, they have frequently been subjects of obscurity and disagreement. In his study of common law thought in the medieval and early modern periods, James Tubbs emphasizes that lawyers and judges were concerned much more with technicalities of pleading and procedure than with theoretical questions, and consequently there is little systematic discussion of general jurisprudence in the common law literature until the sixteenth century.²⁸ Even then, “[t]he impression one gets from reading a wide range of . . . reports . . . is of a profession with very little interest in legal philosophy, one that does not go to the trouble of attempting to formulate a coherent jurisprudence.”²⁹ Tubbs denies that any single conception of the nature of the common law was ever generally accepted.³⁰ Obscurity and disagreement continued even into the seventeenth century, when some eminent lawyers stressed the antiquity of the common law and identified it with custom, while others showed little interest in its age and emphasized its inherent “reason.”³¹ Moreover, agreement as to one of our three questions was often accompanied by disagreement about another. Sir Edward Coke and Sir John Davies, for example, held similar conceptions of the nature of the common

²⁸ Tubbs, *The Common Law Mind*, 23 and 1, respectively.

²⁹ Tubbs, *The Common Law Mind*, 115, 188.

³⁰ Tubbs, *The Common Law Mind*, 48, 65, 69, 70, 115, 162, 190–2.

³¹ Tubbs, *The Common Law Mind*, 194–5, chs. 6–8.

law, but radically different opinions about its scope, especially as to whether it governed the royal prerogative.³² Disagreement about the first and second questions continues today.

Second, the weight of opinion with respect to each question has shifted over time: Some answers that were popular in past centuries were rejected in later ones. In the seventeenth century, it was generally accepted that Parliament had ultimate authority to enunciate and interpret the common law, but that view could now aspire to plausibility only in the tenuous sense that the highest court is formally the House of Lords; in reality it is, of course, a separate court and only nominally a “committee” of that House.

Third, the questions are interrelated, in that a particular answer to one may be difficult to reconcile with a particular answer to another. For example, for reasons given in the [next section](#), if the common law is merely a body of judge-made rules, it cannot be the source or basis of Parliament’s lawmaking authority.³³ On the other hand, if it consists of the customs of the community, this becomes more plausible, as does the broader claim that the unwritten constitution as a whole is a matter of common law.

Fourth, apparent agreement that the unwritten constitution is a matter of common law may obscure disagreement over important details. Even if some seventeenth-century lawyers believed that the most fundamental laws of the constitution were part of the common law, they may have meant something very different from superficially similar beliefs held today. They may have conceived of the common law as the custom of the realm, which the High Court of Parliament – rather than the “inferior courts” of Westminster – had supreme authority to enunciate and expound. That view provides little support for modern theories in which the common law is conceived, on Dworkinian lines, as an evolving body of principles of political morality, which the ordinary courts have ultimate authority to identify and develop.

It is not possible, in this chapter, to provide a comprehensive account of how these three questions have been answered in each of the many centuries over which the British constitution evolved. That would require a book. All that is possible is a brief account of the main issues.

We start with the period up to the sixteenth century, which is obscured by a lack of both clear theoretical thinking about constitutional fundamentals and of written records of what thinking there was. According to Pollock and Maitland, medieval English lawyers had no definite theory of the relationship between enacted and unenacted law, or between law and custom.³⁴ Chrimes reports that

³² See text accompanying n. 91 (discussing Coke), text accompanying nn. 109–11 (discussing Davies).

³³ See text accompanying nn. 173–7.

³⁴ Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (2nd ed.) (vol. 1) (Cambridge University Press, 1968), 176.

“the half-expressed concepts and ideas behind the machinery of government are often elusive and hard to interpret, because of the meagreness with which fifteenth-century people recorded what to them were assumptions that called for no statement.”³⁵

Nevertheless, it is surely significant that in books such as Tubbs’s *The Common Law Mind*, Doe’s *Fundamental Authority in Late Medieval England*, and Chrimes’s *English Constitutional Ideas in the Fifteenth Century*, one searches in vain for any reference to a political theorist or lawyer asserting that the major institutions of government owed their existence and authority to the common law.³⁶ Could this have been one of those “assumptions that called for no comment” mentioned by Chrimes? After all, many writers starting with “Bracton” spoke of kings’ being “under the law.”³⁷ If they meant customary law, and if all customary law was common law, then perhaps the theory of common law constitutionalism was implicit in medieval legal thought. But these are two big “ifs.”

It is tempting to assume that medieval and early modern lawyers regarded both the source and limits of the King’s basic rights and powers as essentially customary. But in fact this is dubious. Some of those rights, powers, and limits were no doubt believed to derive from divine or natural law. Others were regarded as having been laid down in the *Leges Edwardi* and *Leges Henrici*: the Laws of Edward the Confessor, and the Laws of Henry I, respectively. William the Conqueror claimed to be the lawful successor of Edward the Confessor, and Henry I in his coronation charter “confirmed” Edward’s putative laws as amended by William with the consent of his barons.³⁸ When the texts that supposedly recorded these “laws” were revised in the twelfth century, apocryphal additions inserted constitutional ideas derived from scholastic political principles and the English coronation oath.³⁹ The baronial rebellion that led to the Magna Carta was preceded by a demand for the confirmation of Henry I’s charter and was strongly influenced by the *Leges Edwardi*. The *Leges*, along with two other documents of equally dubious origin, the *Mirror of Justices* and *Modus tenendi Parliamentum*, became the core of the so-called “ancient

³⁵ S. B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (American Scholar Publications, 1966), xvi.

³⁶ Tubbs, *The Common Law Mind*; Norman Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge University Press, 1990); Chrimes, *English Constitutional Ideas in the Fifteenth Century*.

³⁷ It is now known that William Raleigh wrote *De Legibus Consuetudinibus*, which Bracon later edited. See Paul Brand, “The Age of Bracton” in John Hudson, ed., *The History of English Law: Centenary Essays on ‘Pollock and Maitland,’* 89 Proceedings of the British Academy 78, 78–9 (1996).

³⁸ J. C. Holt, “The Origins of the Constitutional Tradition in England” in his *Magna Carta and Medieval Government* (Hambledon Press, 1985), 1, 13.

³⁹ Holt, “The Origins of the Constitutional Tradition in England” in Holt, *Magna Carta and Medieval Government*.

constitution” that in later centuries was widely thought to serve both as a shield against tyranny and a justification for rebellion.⁴⁰

Tubbs maintains that when Glanvil and “Bracton” discussed the “unwritten laws” of England, they were referring not to customary laws but to decisions and enactments of kings, acting with the advice of their magnates, that had not been recorded in writing.⁴¹ The most thorough recent study of “Bracton” concludes that:

What he meant by the idea of a king under God and the law was, in the first place, that the king ought to proceed by the judgment of the barons and, secondly, that a king ought to practice the Christian virtues. But neither notion carries with it any connotation of a body of substantive, much less constitutional, law that the king ought not to contravene.⁴²

In the abbreviated version of “Bracton,” known as *Britton*, all English law was depicted as the product of royal authority.⁴³ The substantive common law was, as Charles Ogilvie has observed, “the child of prerogative,” based on the writs of the Angevin and Plantagenet kings that were later supplemented by statute.⁴⁴ It is clear that the king’s clerks and judges had no mandate to deal with the most fundamental laws governing his right to the throne (if there were any) or to question the scope of his powers. Their own jurisdiction and authority were derived from him, and “Bracton” denied that they could hold him to account.⁴⁵ In the many disputes between kings and barons, the latter never appealed to the common law or its courts: They complained that it was the king’s law, and the judges were his servants.⁴⁶ Moreover, “there was so little substantive law that the question of legality at the level of high politics hardly arose. The answer of the great twelfth and thirteenth century law books to fundamental political questions was that such matters lay with the king and magnates of the realm.”⁴⁷

In the fourteenth and fifteenth centuries, it is unlikely that the most basic laws on which royal government rested would have been classified as part of the common law, even if they were by then customary. Tubbs challenges the received view that the common law was, at that time, generally identified with the customs of the realm.⁴⁸ He argues that it was more frequently treated as

⁴⁰ Janelle Greenberg, *The Radical Face of the Ancient Constitution: St. Edward’s “Laws” in Early Modern Political Thought* (Cambridge University Press, 2001). For the actual origins of these documents, see id. at 9, 57–61, 71, 77–8. Note that the term “ancient constitution” is of modern coinage, an attempt to translate old ideas into a modern idiom.

⁴¹ Tubbs, *The Common Law Mind*, 3, 7, 12, 15–17, 189.

⁴² Donald Hanson, *From Kingdom to Commonwealth: The Development of Civic Consciousness in English Political Thought* (Harvard University Press, 1970), 131.

⁴³ Tubbs, *The Common Law Mind*, 187.

⁴⁴ Sir Charles Ogilvie, *The King’s Government and the Common Law 1471–1641* (Blackwell, 1958), 10.

⁴⁵ Goldsworthy, *The Sovereignty of Parliament*, 22–3.

⁴⁶ Hanson, *From Kingdom to Commonwealth*, 159, 188–90, 214.

⁴⁷ Hanson, *From Kingdom to Commonwealth*, 131–2.

⁴⁸ Tubbs, *The Common Law Mind*, 1–2.

the “common erudition” (or in his words, the “learned tradition”) of the bench and bar of the common law courts.⁴⁹ Despite reading 5,000 Year Book cases, he uncovered very little evidence that medieval common lawyers primarily understood their law to be custom,⁵⁰ and even in the sixteenth century, when it was often described as “common usage” or “common custom,” lawyers “nearly always mean only the usage or custom of the bench and bar.”⁵¹ Only in the early seventeenth century did an important common lawyer, Sir John Davies, unequivocally describe the common law as the custom of the English people, and even then, his opinion was unorthodox.⁵² Tubbs’s conclusions corroborate those of Norman Doe, who reports that “forensic and judicial usage and learning”—and judicial rather than popular consent—were treated in the Year Books as the basis of the common law⁵³: “Indeed, the idea that the common law was in the keeping of, or within the control of, the judges was implicit in several stock phrases . . . Sometimes, the judges overtly employ the idea that a rule exists or a result is reached because they “assent” to it.”⁵⁴ This quasi-positivist conception of the nature of the common law surely had implications for its scope. It is unlikely that those who conceived of it as the “common erudition” of the bench and bar would have thought that it governed such fundamental matters as the royal succession, or the privileges and powers of Parliament.

The royal succession was not governed by clear, well-established rules—customary or otherwise—until the eighteenth century. The Crown was at different times claimed by hereditary right, right of conquest, and/or election affirmed by statute.⁵⁵ There was no consensus as to which of these claims had priority, or as to their ultimate basis: A claim to hereditary right, for example, could be based on either custom or the law of God. Chrimes denies that the fifteenth century had any “accepted public law” dealing with the succession.⁵⁶ In Sir John Fortescue’s lengthy defense of the Lancastrian claim to the throne, he relied on natural law, not custom.⁵⁷ In later recanting that defense, he said that

⁴⁹ Tubbs, *The Common Law Mind*, 2, 24–5, 45–52, 56–7, 65–6, 111, 114, 130, 193–4. The common law as “common erudition” is a principal theme in J. H. Baker, *The Law’s Two Bodies: Some Evidential Problems in English Legal History* (Oxford University Press, 2001), Lecture Three, esp. at 67–70, 74–9.

⁵⁰ Tubbs, *The Common Law Mind*, 24, 29, 45–6, 50.

⁵¹ Tubbs, *The Common Law Mind*, 131, 191–2. See also Doe, *Fundamental Authority in Late Medieval English Law*, 26; Alan Cromartie, *Sir Matthew Hale 1609–1676: Law, Religion and Natural Philosophy* (Cambridge University Press, 1995), 14–15.

⁵² Tubbs, *The Common Law Mind*, 192; see also id. at 130–2.

⁵³ Doe, *Fundamental Authority in Late Medieval English Law*, 22; see also id. at 32 (noting that occasionally the fiction was expressed, notably by St. German, that the community had consented to the common law).

⁵⁴ Doe, *Fundamental Authority in Late Medieval English Law*, 23–4.

⁵⁵ Howard Nenner, *The Right to be King: The Succession to the Crown of England 1603–1714* (University of North Carolina Press, 1995), 1–12.

⁵⁶ Chrimes, *English Constitutional Ideas in the Fifteenth Century*, 22, 34.

⁵⁷ Sir John Fortescue, *De Natura Legis Naturae* (Garland Publishing, 1980), referred to in Tubbs, *The Common Law Mind*, 53.

in “the laws of this land . . . the students learn full little of the right of succession of kingdoms.”⁵⁸ In 1460, the judges declined to express an opinion concerning a dispute over the matter, because as “the King’s justices” they were unfit to decide it; moreover,

the matter was so high and touched the King’s estate and regality, which is above the law and passed their learning, wherefore they dared not enter into any communication thereof, for it pertained to the Lords of the King’s blood, and the peerage of this his land, to have communication and meddle in such matters.⁵⁹

It is equally unlikely that the powers and privileges of the “High Court of Parliament” – the highest court in the realm – would have been regarded as subject to the “common erudition” of “inferior courts.” In 1388, the Lords who prepared charges of treason against some of Richard II’s associates, including a number of judges, declared “that in so high a crime as is alleged in this appeal, which touches the person of the King . . . and the state of his realm . . . the process will not be taken anywhere except to Parliament, nor judged by any other law except the law and court of parliament”; “the great matters moved in this Parliament and to be moved in parliaments in the future, touching peers of the land, should be introduced, judged and discussed by the course of Parliament and not by civil law nor by the common law of the land, used in other and lower courts of the land.” This followed advice given by judges and sergeants at law that the proceedings were “not made nor affirmed according to the order which either one or the other of these laws [common or civil] requires.”⁶⁰ In 1454, the judges acknowledged that “the determination and knowledge of that privilege [of the high court of Parliament] belongs to the Lords of Parliament, and not to the justices.”⁶¹ We will later encounter similar views expressed by the House of Commons in 1604, Sir Edward Coke in his *Fourth Institute*, and Sir Matthew Hale.⁶² As Donald Hanson concludes:

Obviously, the estates of the realm in parliament were quite clear that these matters of high politics were not governed by the common law. In short, the men of the Middle Ages were unwilling to attribute to the common law the constitutional bearing which modern enthusiasts have been so ready to see there.⁶³

⁵⁸ Sir John Fortescue, “The Declaracion of Certayn Wrytyngs” in *The Works of Sir John Fortescue*, 532, quoted in Chrimes, *English Constitutional Ideas in the Fifteenth Century*, 22.

⁵⁹ *Rotuli Parliamentorum* (London, s.n., 1767–1777), V, 375–6, quoted in W. H. Dunham and C. T. Wood, *The Right to Rule in England: Depositions and the Kingdom’s Authority, 1327–1485*, 81 *American Historical Review* 738, 750 (1976).

⁶⁰ Bertie Wilkinson, *Studies in the Constitutional History of Medieval England 1216–1399* (vol. 2) (Longmans, 1952), 280, 282; see also S. B. Chrimes and A. L. Brown, eds., *Select Documents of English Constitutional History 1307–1485* (Adam & Charles Black, 1961), 146–9.

⁶¹ *Rotuli Parliamentorum*, V, 240, quoted in Chrimes, *English Constitutional Ideas in the Fifteenth Century*, 152.

⁶² See text accompanying nn. 99–101, 155.

⁶³ Hanson, *From Kingdom to Commonwealth*, 215.

As a body of law administered by particular courts, the common law was sometimes regarded as just one branch of the *lex terrae* or “law of the land.”⁶⁴ On this view, other bodies of law, administered by other courts, were equal in status. The issue was raised during jurisdictional disputes between the common law courts and civil law courts that broke out in the late sixteenth century. The common law judges began to issue prohibitions against suits pending in civil law courts, which resented the loss of business that this threatened to cause.⁶⁵ The civilians could not hope for assistance from Parliament, which was dominated by common lawyers, so they appealed to the king. They argued that as he had delegated his jurisdiction as the “fountain of justice” to all his various courts, he retained supreme authority to determine the boundaries between their jurisdictions. The argument assumed that all his courts – common law, civil law, ecclesiastical, and prerogative, and the bodies of law they administered – were constitutionally parallel and equal, all subordinate to the king, but none to any other.⁶⁶ But some writers had begun to equate the “law of the land” with the common law alone.⁶⁷ The common lawyers regarded their courts and their law as superior to the civil law and its courts. The common law alone constituted the law of England and the supreme guardian of the people’s liberties, and it demarcated the jurisdiction within which civil and other laws could legitimately operate.⁶⁸ The civil law was equivalent to a special body of customary law that was accorded legal recognition for particular purposes by the common law.⁶⁹

The civil lawyers lost this battle, partly because the Tudor monarchs needed the support of the common lawyers to impose royal supremacy over ecclesiastical courts and canon law.⁷⁰ But the common law did not achieve a similar victory in its jurisdictional struggles with courts of equity early in the next century. The Court of Chancery, unlike the civil law courts, could plausibly claim to be as ancient as the common law courts.⁷¹ Furthermore, because Chancellors outranked common law judges, it could also plausibly claim to be the highest of the king’s courts (apart from Parliament itself).⁷² In addition, several writers depicted equity as a moral law deduced directly from the law of God and

⁶⁴ Brian P. Levack, *The Civil Lawyers in England 1603–1641: A Political Study* (Oxford University Press, 1973), 143.

⁶⁵ Levack, *The Civil Lawyers in England*, 72–81.

⁶⁶ Levack, *The Civil Lawyers in England*, 81–3.

⁶⁷ Louis A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge University Press, 1977), 166.

⁶⁸ Levack, *The Civil Lawyers in England*, 144–5, 122–3.

⁶⁹ Levack, *The Civil Lawyers in England*, 145–6.

⁷⁰ Levack, *The Civil Lawyers in England*, 125–6; John Guy, “The ‘Imperial Crown’ and the Liberty of the Subject: The English Constitution from Magna Carta to the Bill of Rights” in Bonnelly Young Kunze and Dwight D. Brautigam, eds., *Court, Country and Culture: Essays on Early Modern British History in Honor of Perez Zagorin* (University of Rochester Press, 1992), 65, 72–3.

⁷¹ Levack, *The Civil Lawyers in England*, 147.

⁷² Knafla, *Law and Politics in Jacobean England*, 160–1.

therefore as inherently superior to all positive laws, including the common law.⁷³ These claims did not, of course, go unchallenged. Common lawyers such as Sir Edward Coke ranked courts according to the law they administered, and because the common law was in his opinion superior to equity, its courts were “above” the Court of Chancery.⁷⁴ Leading common lawyers denied that equity was derived directly from divine law; it was, instead, concerned with the reasons underlying positive laws and aimed merely to prevent strict adherence to legal rules from defeating those reasons.⁷⁵ Lord Chancellor Ellesmere denied both claims of superiority: He regarded Chancery and Star Chamber as equal to the common law courts, and the laws they administered as equally part of the “law of the land.”⁷⁶ James I accepted the view that civil lawyers had urged in the previous century, insisting that he would settle jurisdictional disputes among his courts: It “is a thing regal, and proper to a King, to keep every court within its own bounds.”⁷⁷ He said that the Court of Chancery was “independent of any other Court, and is only under the King . . . from that Court there is no appeal”; if it exceeded its jurisdiction, “the King only is to correct it, and none else.” He explicitly forbade the common law courts from bringing charges of *praemunire* against Chancery for allegedly exceeding its powers.⁷⁸

The common law came to be regarded as superintending all other bodies of law administered by English judges, except for equity, which it never subordinated.⁷⁹ This development appears to have been part, and a partial cause, of broader changes in conceptions of the nature and scope of the common law. Instead of being merely the “common erudition” of particular courts, it was increasingly portrayed as the repository of immemorial customs of the realm, including those dealing with the rights and powers of the king and Parliament. This led to what has been called the “classic age of common-law political thought, of ancient constitutionalism” described by writers such as J. G. A. Pocock and Glenn Burgess.⁸⁰ Janelle Greenberg has shown that constitutional claims based on supposedly “ancient laws,” such as the *Leges Edwardi*, were

⁷³ Knafla, *Law and Politics in Jacobean England*, 161.

⁷⁴ Knafla, *Law and Politics in Jacobean England*, 160.

⁷⁵ Tubbs, *The Common Law Mind*, 102–3.

⁷⁶ Knafla, *Law and Politics in Jacobean England*, 161, 166.

⁷⁷ King James VI and I, “Speech in Star Chamber 1616” in Johann P. Sommerville, ed., *King James VI and I: Political Writings* (Cambridge University Press, 1995), 212, 213. See also “Speech of 21 March 1610” in Sommerville, *King James VI and I*, 188.

⁷⁸ King James VI and I, “Speech in Star Chamber 1616” in Sommerville, *King James VI and I*, 214–15.

⁷⁹ On other bodies of law, see, e.g., Sir Matthew Hale, *The History of the Common Law of England* (Charles M. Gray, ed.) (University of Chicago Press, 1971), 4; Sir William Blackstone, *Commentaries on the Laws of England* (vol. 1) (Oxford University Press, 1765), 15.

⁸⁰ Pocock, *The Ancient Constitution and the Feudal Law*; Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought 1600–1642* (Palgrave Macmillan, 1992).

commonly made long before the seventeenth century.⁸¹ But it may have been only in the late sixteenth century that it became widely believed that the substance of these ancient laws survived only through having been absorbed by the common law, which had thereby inherited their role as the fundamental law of the land.⁸²

Alan Cromartie suggests that assuming the mantle of national custom served the common law's ambitious claim to be able to resolve disputed questions of high politics: "they needed to offer some kind of explanation why the customs observed by the bench should bind upon the nation as a whole."⁸³ Many lawyers thought that the customs of the realm had, in effect, been consented to by the king and the community.⁸⁴ Coke's theory may have been slightly different, but the result was the same. As Charles Gray explains that theory:

[t]he lawyer working exclusively through the law discovered something more than the law – the native fund of preferences and values, national character in effect. . . . [W]ith the faith that legal thinking at its best disclosed 'the common custom of the realm', the lawyer stepped out of his 'art' while refusing to budge from it. He turned political oracle.⁸⁵

Cromartie argues that between 1528 and 1628 there was a "constitutionalist revolution" in English political culture that originated within the legal profession.⁸⁶ Coke, who stated that the "[common] laws do limit, bound and determine of all other human laws, arts and sciences," was particularly influential.⁸⁷ The common lawyers came to think of their law as "the legal master science," based on natural law, which determined the respective rights of the king and his subjects with such perfect reasonableness that no resort to extraneous principles was necessary.⁸⁸ The common law allowed the king's servants to administer

⁸¹ Greenberg, *The Radical Face of the Ancient Constitution*.

⁸² The thesis that the common law originated in these laws is found in the writings of Polydore, Vergil, Holinshed, Sir John Doddridge, John Speed, Peter Heylyn, John Cowell, and William Whiteway, quoted in Greenberg, *The Radical Face of the Ancient Constitution*, 88, 99, 108, 135, 136, 152–3, 156, respectively. See also the views of Hale and Vaughan at n. 139.

⁸³ Cromartie, *Sir Matthew Hale*, 16.

⁸⁴ Cromartie, *Sir Matthew Hale*, 12–13.

⁸⁵ Charles M. Gray, "Parliament, Liberty, and the Law" in J. H. Hexter, ed., *Parliament and Liberty: From the Reign of Elizabeth to the English Civil War* (Stanford University Press, 1992), 155, 162–3. Cromartie's account of Coke's thought is somewhat different. See Cromartie, *Sir Matthew Hale*, 13, 32.

⁸⁶ Alan Cromartie, *The Constitutionalist Revolution: The Transformation of Political Culture in Early Stuart England*, 163 Past and Present 76 (1999), esp. 82 (for the 1528 date), 111 (for the 1628 date). These themes are developed in his *The Constitutionalist Revolution: An Essay on the History of England, 1450–1642* (Cambridge University Press, 2006).

⁸⁷ Cromartie, *The Constitutionalist Revolution*, 163 Past and Present at 88 (quoting Part Three of Coke's Reports in John Farquhar Fraser, ed., *The Reports of Sir Edward Coke* (Joseph Butterworth and Son, 1826), xxxviii).

⁸⁸ Cromartie, *The Constitutionalist Revolution*, 163 Past and Present at 81–2.

other bodies of law only on the condition that they remained accountable to it.⁸⁹ This principle applied not only to rival courts but also to statutory bodies such as Commissioners of Sewers that exercised discretionary powers. But it did not go unchallenged. One lawyer, Robert Callis, rejected Coke's view that all discretions were subject to the rule of common law, arguing that some statutes conferred authority "to order business there arising in course of equity": in other words, discretion guided only by the statutory body's understanding of the law of nature.⁹⁰

Most importantly, Coke's principle applied to the prerogatives of the king himself, which many common lawyers insisted were conferred and limited by the common law.⁹¹ Sir Henry Finch expressed this view when he said that the king's prerogative "grows wholly from the reason of the common law . . . [o]nly the common law is the *primum mobile* which draws all the planets in their contrary course."⁹² (This Latin term – meaning "first moveable" or "prime mover" – had been used by Aristotle, and later Ptolemy, to denote the outermost sphere of the universe believed to cause all the other spheres to revolve around the Earth. This analogy was often used in describing the ultimate source of political and legal authority.) In some quarters, the common law had come to be accepted as governing even the royal succession. In 1571, the Treasons Act declared that it was treason to maintain "that the common law of this realm not altered by parliament ought not to direct the right of the crown of England."⁹³ And in 1610, Thomas Hedley stated that "the common law doth bind, and lead or direct the descent and right of the crown."⁹⁴ He also asserted that "the Parliament has his power and authority from the common law, and not the common law from the parliament. And therefore the common law is of more force and strength than the parliament."⁹⁵ If the common law was the source of the king's title to the throne, his prerogatives, and the authority of Parliament, it was indeed the constitution of the realm.

But not all common lawyers, let alone other members of the ruling elite, agreed with these views. As for the succession, Lord Chancellor Ellesmere said in 1605 that "the King's majesty, as it were inheritable and descended from

⁸⁹ Cromartie, *The Constitutionalist Revolution*, 163 Past and Present at 88.

⁹⁰ Cromartie, *The Constitutionalist Revolution*, 163 Past and Present at 91–2 (quoting Robert Callis, *The Reading of that Famous and Learned Gentleman Robert Callis; Sergeant at Law, upon the Statute of 23 Henry VIII, cap. 5 of Sewers* [William Leak, 1647], 85–6).

⁹¹ Cromartie, *The Constitutionalist Revolution*, 163 Past and Present at 96.

⁹² Sir Henry Finch, *Law, or A Discourse Thereof* (Society of Stationers, 1627), 85.

⁹³ Carl Stephenson and Frederick George Marcham, eds., *Sources of English Constitutional History: A Selection of Documents from A.D. 600 to the Interregnum* (revised ed.) (vol. 1) (Harper & Row, 1972), 352.

⁹⁴ "Speech on Impositions, 28 June 1610" in Elizabeth Read Foster, ed., *Proceedings in Parliament 1610* (vol. 2) (Yale University Press, 1966), 174.

⁹⁵ "Speech on Impositions, 28 June 1610" in Foster, *Proceedings in Parliament* (vol. 2), 174. But see the discussion of his views in Goldsworthy, *The Sovereignty of Parliament*, 117–19.

God, has absolutely monarchical power annexed inseparably to his crown and diadem, not by common law nor statute law, but more ancient than either of them.”⁹⁶ Even Coke agreed that “the King’s majesty, in his lawful, just and lineal title to the Crown of England, comes not by succession only, or by election, but from God only . . . by reason of his lineal descent.”⁹⁷

Although Coke insisted that the king’s prerogatives were conferred and regulated by the common law, he does not seem to have held the same view of Parliament’s privileges. In his *First Institute*, in a list of fifteen “diverse laws within the realm of England,” he included – in addition to the common law itself – the *lex and consuetudo Parliamenti* (the law and custom of Parliament).⁹⁸ Later still, in his *Fourth Institute*, he discussed the relationship between the common law and the *lex and consuetudo Parliamenti*:

And as every court of justice has laws and customs for its direction, some by the common law, some by the civil and canon law, some by peculiar laws and customs, so the High Court of Parliament *suis propriis legibus & consuetudinibus subsistit* [subsists according to its own laws and customs]. It is *lex & consuetudo Parliamenti*, that all weighty matters in any Parliament moved concerning the Peers of the Realm, or Commons in Parliament assembled, ought to be determined, adjudged, and discussed by the course of the Parliament, and not by the civil law, nor yet by the common laws of this realm used in more inferior courts; . . . And this is the reason that judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws, but *secundum legem ad consuetudinem Parliamenti* [according to the laws and customs of Parliament]: and so the judges in divers Parliaments have confessed. And some hold, that every offence committed in any court punishable by that court, must be punished (proceeding criminally) in the same court, or in some higher, and not in any inferior court, and the Court of Parliament has no higher.⁹⁹

Coke clearly did not regard the “law and custom of Parliament” as an example of the local or particular customs whose application the common law sometimes authorized. He listed it separately. Moreover, local or particular customs were not authorized by the common law unless they satisfied the test of reasonableness, and it is hardly likely that judges would have dared to dispute a privilege asserted by Parliament itself, as part of its “law and custom,” on the ground that it was contrary to reason. Parliament was, as Coke acknowledged, the highest

⁹⁶ John Hawarde in William Paley Baildon, ed., *Les Reportes del Cases in Camera Stellata 1593–1609* (London, 1894), 188, quoted in Conrad Russell, “Divine Rights in the Early Seventeenth Century,” in John Morrill, Paul Slack, and Daniel Woolf, eds., *Public Duty and Private Conscience in Seventeenth-Century England* (Oxford University Press, 1993), 101, 117.

⁹⁷ Hawarde, quoted in Russell, “Divine Rights in the Early Seventeenth Century” in Morrill, Slack, and Woolf, *Public Duty and Private Conscience in Seventeenth-Century England*, 118.

⁹⁸ Edward Coke, *The First Part of the Institutes of the Laws of England* (2nd corrected ed.) (Moore, 1629), ch. 1, sec. 3, 12.

⁹⁹ Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* (4th ed.) (Crooke, 1669), ch. 1, 14–15.

court in the realm. Cromartie suspects that Coke's discussion of the *lex and consuetudo Parliamenti* was motivated by a desire to criticize James I's conduct in the 1620s, in attempting to prevent discussion of certain matters in Parliament, and ordering the arrest of leading members of the Commons who had forcibly prevented the Speaker from adjourning debate. Coke was also warning the judges of inferior courts not to interfere with Parliament in such matters.¹⁰⁰ But political motivations no doubt lay behind many of his views, including his expansion of the scope of the common law in other respects. Moreover, there were good precedents for his views about the "law and custom of Parliament." In 1604, the House of Commons complained that James I had accepted an opinion of his judges, concerning a disputed election return, rather than a contrary determination of the House itself: "the judges' opinion. . . being delivered what the common law was, which extends only to inferior and standing courts, ought [not] to bring any prejudice to this High Court of Parliament, whose power being above the law is not founded on the common law but have their rights and privileges peculiar to themselves."¹⁰¹

So not even Coke, the prime exemplar of the "common law mind," consistently held that the common law was the supreme and overarching body of law, which provided the ultimate source of all legal authority and governed the scope and application of all other laws. As for other lawyers, statesmen, and political theorists, many located the ultimate source of political authority not in the common law but in either the king or the community represented in Parliament. Even in the fourteenth and fifteenth centuries, those who sought to account for the authority of legislation had looked not to custom or common law, but to the will of the king or the "common consent" of the whole realm.¹⁰² By the sixteenth century, these strands of thought had evolved into competing theories, one based on the king's divine right to rule and the other on the consent and combined wisdom of the community.¹⁰³ Henry VIII's self-proclaimed "imperial" kingship – deployed to justify his supremacy over the Church – entailed that he was "under God but not the law, because the king makes the law."¹⁰⁴ On this view, the king was the human source of law and political authority, and the foundation of all jurisdictions.¹⁰⁵ The other theory was expounded by Richard Hooker, who argued that "[t]he whole body politic makes laws, which

¹⁰⁰ E-mail from Alan Cromartie to author, 18 March 2005.

¹⁰¹ "The Form of Apology and Satisfaction, 20 June 1604" in J. R. Tanner, ed., *Constitutional Documents of the Reign of James I 1603–1625* (Cambridge University Press, 1930), 221, 224. See also the earlier incident discussed in the text accompanying n. 60.

¹⁰² Doe, *Fundamental Authority in Late Medieval English Law*, 31.

¹⁰³ Goldsworthy, *The Sovereignty of Parliament*, 63–75.

¹⁰⁴ Quoted in Guy, "The 'Imperial Crown' and the Liberty of the Subject" in Kunze and Brautigam, *Court, Country and Culture*, 67–8.

¹⁰⁵ Corinne Comstock Weston and Janelle R. Greenberg, *Subjects and Sovereigns: The Grand Controversy over Legal Sovereignty in Stuart England* (Cambridge University Press, 1981), 87; Goldsworthy, *The Sovereignty of Parliament*, 65–7.

laws give power unto the king.”¹⁰⁶ For many, the two theories could be happily combined to sustain the authority of the king in Parliament, but in the 1640s they were split apart with tragic consequences.

Sir John Davies is often cited as one of the two best examples – the other being Coke – of the “classical” seventeenth-century “common law mind” that placed the common law at the core of the “ancient constitution.”¹⁰⁷ The preface to Davies’s *Le Primer Report des Cases [etc.]* has been described as “the classic exposition of the common lawyer’s viewpoint.”¹⁰⁸ He depicted the common law as the custom of the realm, refined by the accumulated experience and wisdom of countless generations, and warned that whenever it was changed by statute, inconveniences invariably followed.¹⁰⁹ Yet Davies was also a royalist who maintained that originally, the king had possessed “absolute and unlimited power in all matters whatsoever”; that he subsequently agreed to subject his power to the positive law in “common and ordinary cases”; but that he retained “absolute and unlimited” power in other cases. The latter power was not conferred on him by the people or the common law: It was “reserved by himself to himself, when the positive law was first established,” his prerogative being “more ancient than the customary law of the realm” and remaining “above the common law.”¹¹⁰ Davies compared the king “to a *primum mobile*, which carries about all the inferior spheres in his superior course . . . [A]s the King does suffer the customary law of England to have her course on one side, so does the same law yield, submit, and give way to the King’s prerogative over the other.”¹¹¹ He was by no means the only lawyer who held royalist views. Sir Francis Bacon said that “the king holds not his prerogatives of this kind mediately from the law, but immediately from God, as he holds his crown.”¹¹² Others who agreed included Attorney-General and future Chief Justice Sir John Hobart, Chief Baron Fleming, the great antiquary William Lambarde, Lord Keeper Coventry, and Serjeant Ashley.¹¹³ James I was not alone in holding that his “absolute” prerogative was “no subject for the tongue of a lawyer.”¹¹⁴

¹⁰⁶ Richard Hooker, “Of the Laws of Ecclesiastical Polity” in J. Keble, ed., *The Works of Mr. Richard Hooker* (7th ed.) (vol. 3) (Georg Olms Verlag, 1977), 443.

¹⁰⁷ See, e.g., Pocock, *The Ancient Constitution and the Feudal Law*.

¹⁰⁸ David Wootton, ed., *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (Penguin, 1986), 129.

¹⁰⁹ Sir John Davies, *Le Primer Report des Cases* (Flesher, Steater, and Twyford, 1674) in Wootton, *Divine Right and Democracy*, 131–2.

¹¹⁰ Sir John Davies, *The Question Concerning Impositions* (Twyford, 1656), 29–33. For discussion, see Tubbs, *The Common Law Mind*, 133–9.

¹¹¹ Davies, *The Question Concerning Impositions*, 26.

¹¹² James S. Spedding, R. L. Ellis, and D. D. Heath, eds., *The Works of Francis Bacon* (vol. 10) (Longman, 1858–1874), 371. But see id. (vol. 14), 118, quoted in Tubbs, *The Common Law Mind*, 138.

¹¹³ See Goldsworthy, *The Sovereignty of Parliament*, 82–4, esp. 83 n. 40.

¹¹⁴ Charles H. McIlwain, *The Political Works of James I* (Harvard University Press, 1918), 333.

The early seventeenth century was riven by constitutional disputes partly because the law of the constitution was inherently uncertain: Every attempt to state it became “tendentious as soon as it got beyond easy cases. . . . Englishmen did not and could not know sufficiently the rules of the game in which they were players.”¹¹⁵ Proponents of rival ideologies were drawn into debate over which institution was the most ancient: the monarchy, assemblies representing the community, or the common law. The question was regarded as important because, as Corinne Weston explains, “a derived authority was considered inferior to an original one.” William Prynne, for example, observed that “every creator is of greater power and authority than its creature and every cause than its effect.”¹¹⁶ The question was: What was the nature of England’s original constitution?

Leading royalist writers found it incomprehensible that the common law could have come first, or that it could be more fundamental than the authority of the king. In his famous *Patriarcha*, Sir Robert Filmer discussed at length the necessary “dependency and subjection of the common law to the sovereign prince.”¹¹⁷

The common law (as the Lord Chancellor Egerton teaches us) is the common custom of the realm. Now concerning customs, this must be considered, that for every custom there was a time when it was no custom . . . [w]hen every custom began, there was something else than custom that made it lawful, or else the beginning of all customs were unlawful. Customs at first became lawful only by some superior power, which did either command or consent to their beginning. And the first power which we find (as it is confessed by all men) is the kingly power, which was both in this and in all other nations of the world, long before any laws, or any other kind of government was thought of; from whence we must necessarily infer, that the common law itself, or common customs of this land, were originally the laws and commands of kings at first unwritten.¹¹⁸

Not only had kings created the common law, but they retained “absolute authority” to supplement or correct it.¹¹⁹ For this reason, Filmer said elsewhere, the common law “follows in time after government, but cannot go before it and

¹¹⁵ Gray, “Parliament, Liberty, and the Law” in Hexter, *Parliament and Liberty*, 191–2.

¹¹⁶ Corinne Comstock Weston, “England: Ancient Constitution and Common Law” in J. H. Burns, ed., *The Cambridge History of Political Thought 1450–1700* (Cambridge University Press, 1991), 374, 377 (quoting William Prynne, *The Treachery and Disloyalty of Papists to their Sovereigns in Doctrine & Practice* [Cambridge University Press, 1643], 35–6). But not everyone thought the origins of government were important. See Johann P. Sommerville, *Politics and Ideology in England 1603–1640* (Longman, 1986), 105–6.

¹¹⁷ Robert Filmer, *Patriarcha, or the Natural Power of Kings* (Richard Chiswell, 1680), 11, quoted in Johann P. Sommerville, ed., *Patriarcha and Other Writings* (Cambridge University Press, 1991), 54.

¹¹⁸ Filmer, *Patriarcha*, 9, quoted in Sommerville, *Patriarcha and Other Writings*, 45.

¹¹⁹ Filmer, *Patriarcha*, 11, quoted in Sommerville, *Patriarcha and Other Writings*, 54.

be the rule to government by any original or radical constitution.”¹²⁰ Later in the century another prominent royalist, Dr. Robert Brady, criticized Coke for giving the impression that the common law had grown up with the first trees and grass, “abstracting it from any dependence upon, or creation by the government.”¹²¹ For royalists, it was obvious that kings came first, armed with divine authority, and laws followed. The common law was sometimes explained as an innovation of the Norman kings.¹²² Some royalists concluded that, because all law was originally made by kings, it could be unmade or overridden by them.¹²³

The royalist theory was widely regarded as a threat to the traditional rights and liberties of the people, including the powers and privileges of the Houses of Parliament. But there were different ways of resisting that threat. Johann Sommerville shows that anti-absolutists relied either on a contractual theory, according to which the powers of the king were granted and limited by a pact between him and his subjects, or on Coke’s theory of an immemorial common law that stood above both king and people. He denies that everyone who regarded the king’s power as limited subscribed to Coke’s theory: “[T]he vocabulary of contract was almost as common as that of immemorial law.”¹²⁴

Contractualists argued that, whenever the word “parliament” was first used, representative assemblies had existed from time immemorial. John Selden, for example, claimed that kings, nobles, and freemen had shared the power to make law from the inception of civil government in England.¹²⁵ He regarded all law and government as the product of contracts between the king and the people.¹²⁶ His views influenced his younger friends Sir Matthew Hale and Sir John Vaughan.¹²⁷ Others argued for the same conclusion on theoretical rather than historical grounds: There must have been an original contract, whereby the community established the kingship subject to stringent conditions designed to control regal power.¹²⁸ Charles Herle stated that “what is meant by those fundamental laws of this kingdom . . . is that original frame of this co-ordinate

¹²⁰ Robert Filmer, *The Anarchy of a Limited or Mixed Monarchy*, in Sommerville, *Patriarcha and Other Writings*, 131, 153.

¹²¹ Quoted by Weston, “England: Ancient Constitution and Common Law” in Burns, *The Cambridge History of Political Thought 1450–1700*, 407.

¹²² Greenberg, *The Radical Face of the Ancient Constitution* (quoting Samuel Daniel, *The Collection of the History of England* [Simon Waterson, 1626]).

¹²³ Goldsworthy, *The Sovereignty of Parliament*, 83.

¹²⁴ Sommerville, *Politics and Ideology in England*, 79.

¹²⁵ Sommerville, *Politics and Ideology in England*, 62–4; Paul Christianson, “Royal and Parliamentary Voices on the Ancient Constitution c. 1604–1621” in Linda Levy Peck, ed., *The Mental World of the Jacobean Court* (Cambridge University Press, 1991), 71, 83–5.

¹²⁶ Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge University Press, 1979), 96, 99–100; Cromartie, *Sir Matthew Hale*, 32, 37, 39.

¹²⁷ Tuck, *Natural Rights Theories*, 84, 113, 134.

¹²⁸ Sommerville, *Politics and Ideology in England*, 64–6, 106–8.

government of the three Estates in Parliament, consented to and contrived by the people in its first constitution.”¹²⁹ It followed that the law owed its existence to the king, Lords, and Commons acting together, and not to the king alone. In the 1640s, Henry Parker denied that the law was the mother of Parliament; on the contrary, Parliament was “that court which gave life and birth to all laws.”¹³⁰ As the Earl of Shaftesbury put it much later, Parliament, rather than the king or the common law, was “the great spring, the *primum mobile* of affairs.”¹³¹ Many concluded that Parliament was therefore “above the law.”¹³²

Glenn Burgess argues that the doctrine of the ancient constitution broke down partly because of the impact of contractualist ideas.¹³³ He also describes Sir Matthew Hale as one of the few who continued the tradition of thinkers such as Coke.¹³⁴ But Hale was a contractualist. He said that “all human laws have their binding power by reason of the consent of the parties bound.”¹³⁵ Like Selden, he regarded statute as the paradigm of law, and custom as tantamount to statute.¹³⁶ “[T]he laws of England . . . are institutions introduced by . . . will and consent . . . implicitly by custom and usage or explicitly by written laws or Acts of Parliament.”¹³⁷ Hale surmised that “doubtless, many of those things that now obtain as common law, had their original by Parliamentary Acts or Constitutions, made in writing by the King, Lords and Commons.”¹³⁸ Because authentic records of these ancient statutes (such as parliament rolls) had presumably been lost or destroyed, their substance survived only through their having been absorbed into the common law: For legal purposes, they existed “before time of memory.”¹³⁹ Hale’s friend Sir John Vaughan agreed that this was why “many

¹²⁹ Charles Herle, *A Fuller Answer to a Treatise Written by Doctor Ferne etc.* (John Bartlet, 1642), 6.

¹³⁰ Henry Parker, *Observations Upon Some of His Majesties Late Answers and Expresses* (London, s.n., 1642), 42, reprinted in William Haller, *Tracts on Liberty in the Puritan Revolution 1638–1647* (vol. 2) (Octagon Books, 1979). See also similar statements quoted in Goldsworthy, *The Sovereignty of Parliament*, 106.

¹³¹ Earl of Shaftesbury, *Some Observations Concerning the Regulation of Elections for Parliament* (Randall Taylor, 1669), 5, quoted in Goldsworthy, *The Sovereignty of Parliament*, 150.

¹³² Goldsworthy, *The Sovereignty of Parliament*, 130; see also *id.* at 106.

¹³³ Burgess, *The Politics of the Ancient Constitution*, 99, 231.

¹³⁴ Burgess, *The Politics of the Ancient Constitution*, 231.

¹³⁵ D.E.C. Yale, ed., *Sir Matthew Hale’s The Prerogatives of the King* (Selden Society, 1976), 169; Cromartie, *Sir Matthew Hale*, 23, 46, 49, 57, 67, 77, 88.

¹³⁶ Cromartie, *Sir Matthew Hale*, 52.

¹³⁷ Matthew Hale, “Reflections on Hobbes’ *Dialogue*” in Sir William Holdsworth, ed., *History of English Law* (vol. 5) (Sweet & Maxwell, 1945), 500, 505; Yale, *Sir Matthew Hale’s The Prerogatives of the King*, 169.

¹³⁸ Hale, *The History of the Common Law of England*, 4, 6, 44–5. Note that by “constitutions” he meant particular written laws – like the so-called “constitutions of Clarendon” – and not a constitution in our sense of the term. Elsewhere he said that “positive constitutions . . . with us are called statutes or ordinances.” Yale, *Sir Matthew Hale’s The Prerogatives of the King*, 169.

¹³⁹ Hale, *The History of the Common Law of England*, 4. Hale and Vaughan both understood “time of memory” to have been fixed for legal purposes as the period after 1189, the

laws made in the time of the Saxon Kings, of William the First, and Henry the First . . . are now received as common law.”¹⁴⁰ But he went further than Hale, asserting that “most” of the common law must have originated in Acts of Parliament or their equivalent.¹⁴¹

Hale recognized that the common law could change but also thought, in Charles Gray’s words, that “one essential thing has remained unchanged throughout: the basic political frame, or the constitutional rules by which other rules [could] be authoritatively recognized as binding.”¹⁴² What was this “political frame”? Hale said that the common law was:

the common rule for the administration of common justice in this great kingdom; . . . it is not only a very just and excellent law in itself, but it is singularly accommodated to the frame of the English government, and to the disposition of the English nation, and such as by a long experience and use is as it were incorporated into their very temperament, and, in a manner, become the complection [complexion] and constitution of the English commonwealth.¹⁴³

Here, Hale was using the word “constitution” in a medical sense, to mean the commonwealth’s natural state of health.¹⁴⁴ It is significant that he described the common law as “singularly accommodated to” the frame of government, and not as *forming* or *embodying* the frame of government. By “the frame of the English government,” he meant law making by the King, with the assent of whatever assembly from time to time represented the people.¹⁴⁵

In his *Prerogatives of the King*, Hale discussed how the “nature and extent of any government in any kingdom or place” could be ascertained. He explained that in the absence of actual records of “the original of government,” “the original of that pact or constitution of our government”

we must have recourse to the common custom and usage of the kingdom. . . . I mean such customs as have been allowed by the known laws of the kingdom. And therefore under the word custom I take in the traditions and monuments of the municipal laws,

beginning of the reign of Richard I. See Alan Wharan, *The 1189 Rule: Fact, Fiction or Fraud?*, 1 *Anglo-American Law Review* 262 (1972). Plucknett has argued that Hale was quite right to suspect that the common law often originated in legislation of one kind or another. Thomas Plucknett, *Legislation of Edward I* (Oxford University Press, 1962), 8–9.

¹⁴⁰ *Thomas v. Sorrell*, (1677) Vaugh 330, 358, 124 Eng. Rep. 1098, 1112. In the full passage, Vaughan clearly uses the word “constitution” in the same sense as Hale. See n. 138.

¹⁴¹ *Sheppard v. Gosnold*, (1672) Vaugh 159, 163, 124 Eng. Rep. 1018, 1020. See also *Thomas*, Vaugh at 358, 124 Eng. Rep. at 1112.

¹⁴² Gray’s introduction to Hale, *The History of the Common Law of England*, xxiii.

¹⁴³ Hale, *The History of the Common Law of England*, 30.

¹⁴⁴ Cromartie, *Sir Matthew Hale*, 63.

¹⁴⁵ In his *Prerogatives of the King*, Hale distinguished the “frame of government” – whether monarchical, aristocratic, democratic, or mixed – from “the particulars of government,” which include the rights of the king and the people. See Yale, *Sir Matthew Hale’s The Prerogatives of the King*, 6.

law-books, records of judgments and resolutions of judges, treaties and resolutions and capitulations of regular and orderly conventions, authentical histories, concessions of privileges and liberties . . .¹⁴⁶

For example, “by the laws of this kingdom the regal government is hereditary and transmitted by descent. This appears not only by the recognition of 1 Jac. and 1 Eliz., but by the constant usage.”¹⁴⁷ Evidence of the pact that established the government of England was therefore not confined to the records of common law but included statute law as well. According to Cromartie, Hale regarded Parliament as the only place where the fundamental compact could be deliberately altered, the only place in which the “consent of the people [and es]tates of the kingdom” could be voiced.¹⁴⁸ That is why, when Henry VIII wished to dispose of the Crown by his last will, “he could not make such disposal without an act of parliament enabling him.”¹⁴⁹ But the compact could also be altered by changes in custom and usage, which were evidence of mutual consent.¹⁵⁰ In that sense, Hale attributed to the common law the capacity to change the constitution, although Cromartie adds that in this respect the common law “was conceptually equivalent to an enormous statute, on which the king and people had tacitly agreed.”¹⁵¹ Hale did not think of the common law as something that could be altered by judges. He said that when the common law failed to provide a remedy for injustice, only Parliament could provide what was needed by making a new law. Not even the House of Lords, the highest ordinary court of appeal, could grant a remedy if no established law provided for one: “for that were to give up the whole legislative power unto the House of Lords. For it is all one to make a law, and to have an authoritative power to judge according to that, which the judge thinks fit should be law, although in truth there be no law extant for it.”¹⁵²

Hale acknowledged that the common law dealt with matters of a fundamental nature, such as “the safety of the king’s royal person, his crown and dignity, and all his just rights, revenues, powers, prerogatives and government . . . and this law is also, that which declares and asserts the rights and liberties, and the properties of the subject.”¹⁵³ On the other hand, he insisted that Parliament as a whole (and not the House of Lords alone) was the “dernier resort” – the

¹⁴⁶ Yale, *Sir Matthew Hale’s The Prerogatives of the King*, 7–8.

¹⁴⁷ Yale, *Sir Matthew Hale’s The Prerogatives of the King*, 13.

¹⁴⁸ Cromartie, *Sir Matthew Hale*, 50; Yale, *Sir Matthew Hale’s The Prerogatives of the King*, 15.

¹⁴⁹ Yale, *Sir Matthew Hale’s The Prerogatives of the King*, 18.

¹⁵⁰ Cromartie, *Sir Matthew Hale*, 49, 102.

¹⁵¹ Cromartie, *Sir Matthew Hale*, 49.

¹⁵² Cromartie, *Sir Matthew Hale*, 117 (quoting Matthew Hale in F. Hargrave, ed., *The Jurisdiction of the Lords House, or Parliament, Considered According to Ancient Records* [T. Cadell and W. Davies, 1796], 108–9).

¹⁵³ Hale, *The History of the Common Law of England*, 30–1.

supreme and final court of appeal – with respect to all questions of law.¹⁵⁴ These included questions that were too high for inferior courts, raised by cases that were:

so momentous, that they are not fit for the determination of judges, as in questions touching the right of succession to the crown . . . or the privileges of parliament . . . or the great cases which concern the liberties and rights of the subject, as in the case of Ship Money, and some others of like universal nature.¹⁵⁵

Hale subscribed to the belief that a representative assembly of some kind had always existed in England.¹⁵⁶ This became central to the ideology of the Whigs but was strenuously denied by most Tories. As J. G. A. Pocock describes that ideology:

it was now parliament, rather than the law as a whole, which was being presented as immemorial; and the claim to be immemorial had been virtually identified with the claim to be sovereign. . . . The whole concept of ancient custom had been narrowed down to this one assertion, that parliament was immemorial. . . . The medieval concept of universal unmade law, which the notion of ancient custom had sought to express, had collapsed.¹⁵⁷

According to Burgess, the “classic age” of common law political thought and ancient constitutionalism came to an end in the 1640s, when loss of faith in the common law’s ability to control the Crown prompted a shift to other modes of political and legal thought, relying on necessity, *salus populi*, or social contract, rather than custom.¹⁵⁸ Janelle Greenberg disagrees, pointing out that ancient constitutionalism and contract theory were perfectly compatible because the original constitution was widely regarded as having been established by contract. She argues that in the 1640s ancient constitutionalism took on “a new and even more vigorous life.”¹⁵⁹ But Burgess may be partly right, insofar as the “common law” version of ancient constitutionalism was thrust aside by the contractualist version.

There is insufficient space here to trace further developments. The eighteenth and nineteenth centuries were dominated by the political theory of sovereignty. Writers such as Blackstone did not derive the authority of Parliament from the common law. In discussing the application of civil and canon law by special

¹⁵⁴ Hale in Hargrave, *The Jurisdiction of the Lords House*. See Goldsworthy, *The Sovereignty of Parliament*, 121.

¹⁵⁵ Hale, *The Jurisdiction of the Lords House*, n. 152, 159.

¹⁵⁶ Cromartie, *Sir Matthew Hale*, 50.

¹⁵⁷ Pocock, *The Ancient Constitution and the Feudal Law*, 234; see also id. at 239. Corinne Comstock Weston asserts that this happened in the 1640s. See Weston, “England: Ancient Constitution and Common Law” in Burns, *The Cambridge History of Political Thought 1450–1700*, 397–8.

¹⁵⁸ Burgess, *The Politics of the Ancient Constitution*, 99, 221–31.

¹⁵⁹ Greenberg, *The Radical Face of the Ancient Constitution*, 21–2, 157. See also the many references in her index to “contract theory of government.”

courts, he denied that “their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament.” Instead, all their “strength” within the realm was due either to having been “admitted and received by immemorial usage and custom in some particular cases, and some particular courts, and then they form a branch of the *leges non scripta*, or customary law; or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scripta*, or statute law.”¹⁶⁰ This assumes that the authority of Acts of Parliament was not itself derived from customary law: Indeed, he asserted that it is “intrinsic.” Elsewhere, he referred to “the natural, inherent right that belongs to the sovereignty of a state . . . of making and enforcing laws.”¹⁶¹ In his view, the existence of a legislature with sovereign lawmaking authority was not a contingent feature of a legal system that depended on local customs. It was, instead, “requisite to the very essence of a law”: Sovereignty “must in all governments reside somewhere.”¹⁶² It might be objected that, even if the existence of a sovereign legislature of some kind is a necessity, its identity and composition in a particular society must be contingent, and could be determined by custom. But for Blackstone, England’s legislature was established by “an original contract, either express or implied,” entered into by “the general consent and fundamental act of the society.”¹⁶³ Moreover, Parliament’s moral authority flowed partly from the security provided by the checks and balances among the monarchical, aristocratic, and democratic principles embodied in its three component elements.¹⁶⁴ Blackstone had no need to rely on the authority of custom.

What conclusions can be drawn from this brief historical survey? First, there is no evidence of significant, if any, support for common law constitutionalism before the seventeenth century. On the contrary, there is solid evidence that it was widely rejected. For much of the pre-modern period, the common law was regarded as the “common erudition” of the bench and bar.¹⁶⁵ The idea that the authority of the judges’ superiors – the king who appointed and could dismiss them, and the High Court of Parliament that could overturn their decisions – was the product of their decisions, or of their “erudition,” would have been dismissed out of hand as an absurdity. That is partly why, on several occasions, it was expressly and authoritatively denied that either the royal succession or Parliament’s privileges were governed by the common law.

Second, even in the seventeenth century, arguably the “classical age” of common law constitutionalism, that theory was fully embraced only by a few lawyers such as Thomas Hedley. Sir Edward Coke denied, at least on some occasions, that the royal succession and the privileges of Parliament were governed

¹⁶⁰ Blackstone, *Commentaries on the Laws of England*, 79–80.

¹⁶¹ Blackstone, *Commentaries on the Laws of England*, 47.

¹⁶² Blackstone, *Commentaries on the Laws of England*, 46, 156.

¹⁶³ Blackstone, *Commentaries on the Laws of England*, 52.

¹⁶⁴ Blackstone, *Commentaries on the Laws of England*, 50–1.

¹⁶⁵ See text accompanying nn. 48–54.

by the common law. He famously held that the king's prerogatives were so governed. But Sir John Davies, who shared Coke's conception of the nature of the common law, was a royalist who believed that as the human source of all legal authority, the king had retained prerogative powers that were "above" the common law. Many lawyers, and other members of the ruling elite, agreed with him. Many others were contractualists, who believed that legal authority derived from the community as a whole, which had entered into a pact with the king that conferred and limited his powers. After the seventeenth century, the political theory of sovereignty, which maintained that there must be a sovereign legislator in every state that by definition stands above the law, became ascendant.

Third, for most of the period surveyed here, almost everyone accepted that the High Court of Parliament was the highest court in the realm, with ultimate authority to declare and interpret the common law itself.¹⁶⁶ Even lawyers such as Thomas Hedley therefore accepted a version of common law constitutionalism that is very different from modern versions of the theory, which attribute ultimate authority to expound and develop the unwritten constitution to judges.

It must be conceded that, over the centuries, the scope of the common law has steadily expanded. For example, the theory that the king possessed "absolute" prerogatives that were above the common law eventually lost credibility. All the powers of the Crown are now creatures of either statutory or common law, and today the unwritten constitution is largely a matter of common law. Parliamentary sovereignty may be the final bastion that still resists the common law's imperial ambitions. But the common law's subjugation of other sites of legal authority does not entail that, by some kind of immanent logic, it is entitled and destined to sweep the field.

III. Philosophical Analysis

I have shown that common law constitutionalism has much weaker historical credentials than is often assumed. But many lawyers accept the theory for philosophical rather than historical reasons. In the limited space that remains, these reasons will be briefly examined.

Common law constitutionalism is sometimes the conclusion of an inquiry into the source or basis of the authority of the doctrine of parliamentary sovereignty. Adam Tomkins, for example, asks:

What then is the legal authority for the rule [of parliamentary sovereignty]? What is its source? There are two alternatives: authority might be found either in statute or in common law. The first of these options may relatively quickly be dismissed. Parliament has never legislated so as to confer legislative supremacy on itself. . . . The doctrine of legislative supremacy is a doctrine of the common law.¹⁶⁷

¹⁶⁶ Goldsworthy, *The Sovereignty of Parliament*, 110, 118–19, 153–4, 156–7.

¹⁶⁷ Adam Tomkins, *Public Law* (Oxford University Press, 2003), 103.

Tomkins is concerned with the source or basis of the doctrine's *legal* authority, whereas other writers seem more concerned with its *moral* authority. Let us assume, for the moment, that there is a difference.

If we are concerned with legal authority, then it is not clear that there is any need to resort to deeper principles. There cannot be an infinite regress of legal institutions or norms, each owing its authority to the next in line. There must be a basic norm or set of basic norms that is authoritative for legal purposes. These basic norms might simply be that the institutions in question possess the legal authority that is generally attributed to them. Consider written constitutions, for example. In Australia, it has become common for people to ask what the current legal foundation of the Australian Constitution is. Since the British Parliament, which originally enacted the constitution, lost its authority to change Australian law, the answers usually given are either the common law, or the sovereignty of the people. But no good reason has been given for assuming that, for legal purposes, the constitution must rest on some deeper legal foundation. Why cannot the constitution itself be the ultimate foundation of the legal system, with no need for the support of deeper legal norms? And if it can, then presumably the generally accepted norms of an unwritten constitution can play the same role. In other words, constitutional doctrines such as that of parliamentary sovereignty can be legally fundamental, requiring no deeper legal support.

If, on the other hand, we are concerned with moral rather than legal authority – either for its own sake, or because positivists are wrong to think that the two are distinct – another question arises. Why would an enquiry into the ultimate source or basis of the *moral* authority of a legal institution or norm be satisfied by an appeal to a deeper *law*, such as the common law? Even if it did look to the common law, would it not insist on digging even deeper, and inquiring into the moral authority of that body of law? It is, after all, a moral rather than a legal source that is required here, and many candidates are available: necessity, prudence, justice, equality, fraternity, duty to others, fair play, consent, and so on. This is why political and legal thinkers in past centuries, when reflecting on the law's moral authority, appealed to a variety of competing principles such as divine right, natural law, ancient custom, social contract, the checks and balances of "mixed government," the collective wisdom of the community, and the practical necessity of sovereign power.

The nature of fundamental legal norms is admittedly a subject of philosophical puzzlement. That is why we turn to thinkers such as Kelsen and Hart for enlightenment. Perhaps what people like Tomkins really seek, when they ask about the ultimate source or basis of the authority of constitutional doctrines, is a philosophical *explanation* of the nature of legal authority and of ultimate legal norms. But that is quite different from what they expressly ask for. Hart's theory of law, for example, helps us understand the nature and mode of existence of fundamental legal norms, and what it means to say that they are legally authoritative, but it does not provide a source or basis for their legal authority.

Common law constitutionalists might reply that, even if constitutional norms such as the doctrine of parliamentary sovereignty are legally fundamental and do not derive their authority from deeper legal principles, it is still useful to classify them. Even if they do not rest on deeper common law principles, it may still be the case that they themselves are part of the common law.

It should be noted at this point that the common law constitutionalists' interest in classifying such norms as "common law" is not merely taxonomical. They believe that it has an important practical consequence – namely, that such norms are "in the keeping of the courts," which have authority either to change them, or at least authoritatively to declare that they have changed. Thus, having decided that parliamentary sovereignty is a common law rule, Tomkins infers that "[l]ike any other rule of the common law it may be developed, refined, re-interpreted, or even changed by the judges."¹⁶⁸ But there is a chicken/egg problem here: Is the existence of authority to change legal norms a consequence of their correct classification, or is their correct classification partly dependent on the nature and location of authority to change them? Whether we should classify unwritten constitutional norms as "common law" surely depends partly on whether they share the distinctive characteristics of the large body of norms that uncontroversially bear that label – those of contract, property, tort, and so on. These are the characteristics that distinguish the common law from statute law. Among them is that common law norms have been developed by judicial decisions over many centuries, and that the courts have acknowledged authority to continue to develop them. But there are still major theoretical disagreements about the precise nature of these norms, and the way in which they are properly developed by judicial decisions. At least four conceptions of the nature of the common law currently compete for acceptance.

First, there is a legal positivist conception of the common law as a body of judge-made rules, which Brian Simpson in 1973 described as the "predominant conception."¹⁶⁹ Second, there is the conception that Simpson himself advocated, of the common law as professional custom: "a body of practices observed and ideas received by a caste of lawyers . . . [and] used by them as providing guidance in what is conceived to be the rational determination of disputes . . ."¹⁷⁰ This resembles the conception of the common law as the "common erudition" of the bench and bar, which historians have found in the fourteenth- and fifteenth-century Year Books.¹⁷¹ Third, there is Dworkin's conception of the common law

¹⁶⁸ Tomkins, *Public Law*, 103.

¹⁶⁹ A.W.B. Simpson, "The Common Law and Legal Theory" in A.W.B. Simpson, ed., *Oxford Essays in Jurisprudence (Second Series)* (Oxford University Press, 1973), reprinted in A.W.B. Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon, 1987), 359, 361.

¹⁷⁰ Simpson, "The Common Law and Legal Theory" in Simpson, *Legal Theory and Legal History*, 376.

¹⁷¹ See text accompanying nn. 48–54.

as a presumptively coherent body of norms, resting on fundamental principles of political morality, which the judiciary has authority to identify and expound. This is in several respects similar to the conception held by Sir Edward Coke in the early seventeenth century.¹⁷² Fourth, the common law in constitutional matters can be conceptualized as customs or conventions either of the community in general, or of government officialdom. In addition, other conceptions are possible, including various “hybrids” that combine elements of two or more of these four.

Whether unwritten constitutional norms are matters of common law depends on two questions: which of these conceptions of the common law is the most plausible, and whether those norms fit within that conception. I will attempt to answer only the second question.

Versions of common law constitutionalism based on the first and second conceptions of the common law, as judge-made law, or as the custom or “common erudition” of the legal profession, are all implausible. As a matter of history, it is plainly false that the authority of either the king or Parliament was established either by judicial decisions or the “common erudition” of the legal profession.¹⁷³ And philosophically, there is an incongruity between the legal doctrine that the courts are obligated to obey statutes, because Parliament is sovereign, and the theory that the courts can at any time release themselves from the obligation, because Parliament’s sovereignty is their creation, and subject to their control.¹⁷⁴ We would not normally agree that *x* is obligated to obey *y*, if the suggested obligation is self-imposed and can be repudiated whenever *x* thinks it appropriate to do so. Such an “obligation” would be illusory.

There is, in addition, a deeper philosophical problem. Tomkins’s implicit assumption that there are only two kinds of law in Britain, statute law and common law, is demonstrably false if the common law is judge-made law. It is true that the basis of the doctrine of parliamentary sovereignty cannot be statute. No legislature can confer authority on itself by statute, because absent preexisting authority, the statute would have to confer authority on itself, which would beg the question.¹⁷⁵ As Lord Lester points out, “Parliament cannot pull itself up by its own bootstraps.”¹⁷⁶ But it is a mistake to jump to the conclusion that the doctrine must therefore be a matter of judge-made common law. After

¹⁷² The similarities clearly emerge in Gray, “Parliament, Liberty, and the Law” in Hexter, *Parliament and Liberty*.

¹⁷³ For Parliament, see the historical study in Goldsworthy, *The Sovereignty of Parliament*, chs. 1–8, which is summarized in ch. 9.

¹⁷⁴ See Thomas, *The Relationship of Parliament and the Courts*, 31 Victoria University of Wellington Law Review at 26 (“The conferral of that recognition [of Parliament’s sovereignty] is in the nature of a self-denying judicial ordinance.”).

¹⁷⁵ Note, however, that the Treasons Act of 1571 declared that it was treason to deny that Parliament had authority to regulate the royal succession.

¹⁷⁶ Lester, *Beyond the Powers of Parliament*, [2004] Judicial Review at 96. It follows that, in New Zealand, Parliament’s authority cannot derive exclusively from § 15(1) of the

all, it could then be asked where the judges got *their* authority from. If it is true, as Lord Steyn insists, that Parliament's authority "must come from somewhere," it must be equally true of the judges' authority. But they, too, cannot "pull themselves up by their own bootstraps," by conferring authority on themselves. It follows that their authority cannot come from the common law, if this is judge-made law. If it were true that all British law is either common law or statute law, their authority would then have to come from statute law – giving rise to a vicious circle in which Parliament's authority to enact statutes is conferred by judge-made common law, and the judges' authority to make common law is conferred by statute. To break the circle, someone's legal authority – Parliament's, the judges', or both – must be grounded in a kind of law that was not made either by Parliament or by the judges.

Common law constitutionalists must therefore subscribe either to the third or to the fourth conception of the common law. According to the third one, the common law is a body of norms based on fundamental principles of political morality, which the judges enunciate and expound but have no authority to change. The identity of these principles is an objective matter: They are whatever principles provide the best moral justification of the common law as a whole. This is the conception favored by most modern common law constitutionalists.¹⁷⁷ On this view, the unwritten constitution consists of whatever fundamental principles of political morality provide the strongest moral justification of the entire legal system. These principles may therefore change if other parts of the system change. Judges do not have authority to change them, but they do have authority to declare either that they have changed or that previous understandings of them were mistaken.

Dworkin's conception of the common law is plausible because it fits the way judges develop that law. Judges do seem to believe that a constantly evolving body of fundamental principles guides them in deciding novel questions, and in overruling past doctrines that they have come to regard as erroneous. Moreover, their authority not only passively to identify and apply, but also actively to develop, these principles is acknowledged by other legal officials. Dworkin's conception can therefore form part of a plausible interpretation of the practices and understandings of legal officialdom. The problem with extending his conception of the common law to encompass the doctrine of parliamentary sovereignty is that this would not be equally consonant with official practices and understandings. There is no settled official understanding that the doctrine is merely one of a number of principles of political morality, which the judges have ultimate authority to identify and creatively develop. Common law constitutionalists assert that judges possess authority to decide whether parliamentary

Constitution Act of 1986 (NZ), or § 3(2) of the Supreme Court Act of 2004 (NZ), which refer, respectively, to Parliament's "full power to make laws" and to its "sovereignty."

¹⁷⁷ See generally the references to Trevor Allan's work in n. 2.

sovereignty has come to be inconsistent with other fundamental common law principles and, if they think it has, to modify or repudiate it. But unless they can show that this is an interpretation that fits official practices and understandings, it remains a bare assertion. I have argued, elsewhere, that official practices do not justify such an interpretation.¹⁷⁸

In this regard, an interpretation of the practices and understandings of legal officialdom must extend further than those of the judiciary. Let us imagine that the highest court endorses a Dworkinian interpretation of the unwritten constitution, holding it to rest on fundamental principles of political morality that confer and limit the authority of all governmental institutions, including Parliament. In the absence of a broader official consensus either as to the nature of the unwritten constitution or as to the judges' authority to interpret it in that way, their interpretation could claim no better authority than their own say-so. That would be just as question-begging and boot-strapping as the theory that the unwritten constitution is a matter of judge-made law. If the judges' claim to possess authority to interpret the unwritten constitution is itself a product of their interpretation of it and derives from whatever principles of political morality they regard as morally justifying the legal system as a whole, then the theory of common law constitutionalism ultimately rests on nothing more solid than their claim that it is morally compelling. This is hardly likely to persuade other theorists or legal officials – in Parliament, for example – who have a very different understanding of the nature of the unwritten constitution and its moral justification.

Dworkin's conception of the common law, when extended to the unwritten constitution, is distinctive in that it almost merges legal and moral authority. The deepest principles of the common law confer moral as well as legal authority on all other legal norms because, by definition, they just are whatever principles of political morality provide the best moral justification of the legal system as a whole. They must therefore consist of some selection, appropriately weighted, from the principles of political morality previously listed: necessity, prudence, justice, equality, fraternity, duty to others, fair play, consent, and so on.¹⁷⁹ But no proposed moral justification of the law as a whole can realistically hope to secure widespread agreement. Many justifications, drawing on these diverse moral principles, have been proposed by political philosophers, and all remain deeply controversial. Judges are not recognized as having authority to settle this controversy. And it would be question-begging and boot-strapping if their claim to possess authority to settle it were itself based on their proposed settlement of it – that is, on their assessment of the deepest principles of political morality. Any other institution, such as Parliament, could with equal plausibility claim the very same authority.

¹⁷⁸ Goldsworthy, *The Sovereignty of Parliament*; Goldsworthy, *Homogenizing Constitutions*.

¹⁷⁹ See 230 above.

As I have argued at length elsewhere, self-proclaimed moral authority – even if it is justified – is incapable by itself of sustaining law. That is why legal authority depends on general consensus, at least among the senior officials of all branches of government.¹⁸⁰ This leads to the fourth conception of the common law as judicially enforceable customs of legal officialdom, or of the community in general, which the judges did not create, and cannot change, unilaterally.¹⁸¹ Mark Elliott has developed a conception of this kind, according to which the common law constitution consists of constitutional conventions that have crystallized into laws.¹⁸² The existence of constitutional conventions requires consensus among legal officials, including politicians. If Elliott is right, the common law constitution also depends on such a consensus and can change only if that consensus changes.

Understanding the unwritten constitution in terms of official consensus is supported by H.L.A. Hart's theory that the fundamental rules of recognition in any legal system are constituted by the practices of legal officials.¹⁸³ Such rules simply *are* whatever rules legal officials do in fact accept and follow when they make, recognize, interpret, or apply law. For this purpose, "legal officials" cannot mean judges alone, and that was certainly not what Hart meant.¹⁸⁴ Otherwise, his theory could not account for the authority exercised by the judges themselves. The fundamental rules of a legal system are necessarily established and maintained by a consensus among the senior officials of all branches of government. Only such a general consensus can provide both the coherence and stability that a legal system needs to survive and function effectively, and a satisfactory explanation of the authority exercised by each branch of government individually.¹⁸⁵

On this view, parliamentary sovereignty, like other unwritten constitutional rules, does depend on judicial acceptance.¹⁸⁶ Judicial acceptance is a necessary condition for the existence of such rules. But it is not a sufficient condition, because the acceptance of the other branches of government is also necessary. And the judges' judicial authority is equally dependent on acceptance by the political branches. This means that any attempt by the judiciary unilaterally to change the fundamental rules of a legal system is fraught with danger. Other officials might be persuaded, inveigled, bamboozled, or bluffed into acquiescing in the change. But, on the other hand, they might not. They might resent and resist the judicial attempt to change the rules that had previously been generally

¹⁸⁰ Goldsworthy, *The Sovereignty of Parliament*, 254–6.

¹⁸¹ See 232 above.

¹⁸² Mark Elliott, *Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention*, 22 *Legal Studies* 340, 362–76 (2002).

¹⁸³ See H.L.A. Hart, *The Concept of Law* (2nd ed.) (Oxford University Press, 1994), ch. 6.

¹⁸⁴ Goldsworthy, *The Sovereignty of Parliament*, 240–2.

¹⁸⁵ Goldsworthy, *The Sovereignty of Parliament*, 6, 240–6.

¹⁸⁶ Goldsworthy, *The Sovereignty of Parliament*, 26.

accepted and take strong action to defeat it, possibly including the impeachment of “over-mighty judges.” That might be regrettable, but the point is that if the judges tear up the consensus that constitutes the fundamental rules of the system, they are hardly well placed to complain if it is replaced by a power struggle they are ill equipped to win. In the absence of consensus, their own authority as well as Parliament’s would be up for grabs. Rules of recognition can and do change, but fundamental change in an unwritten constitution requires a change in official consensus. Judges can attempt to initiate such a change but are well advised to make sure that the other branches of government are likely to acquiesce. If that cannot be confidently expected, they would be wise to wait for the legislature to initiate change.

This conception of the common law constitution is consistent with the nature of fundamental unwritten constitutional rules, and the process by which they are changed. But it is still problematic. The problem is that describing the unwritten constitution as a matter of common law, even in this sense, is likely to breed confusion. The vast bulk of the common law consists of substantive rules and principles, governing property, contracts, torts, and so on that are not constituted by a consensus of legal officialdom in general and are therefore able to be changed without such a consensus having to change. Judges are now recognized as having authority unilaterally to change these rules and principles, or to declare that they have changed. They are best conceptualized as judicially posited rules, judicial customs, or Dworkinian principles.¹⁸⁷ To apply the same label, “common law,” to the most fundamental norms of the unwritten constitution is likely to produce confusion, erroneous assumptions about the authority of judges to change them, and conflict among the branches of government. They are best regarded as “*sui generis*, a unique hybrid of law and political fact deriving [their] authority from acceptance by the people and by the principal institutions of the state, especially parliament and the judiciary.”¹⁸⁸

¹⁸⁷ We do not need to choose between these alternatives here.

¹⁸⁸ George Winterton, “Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?” in Charles Sampford and Kim Preston, eds., *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996), 121, 136.

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